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No. 03-

IN THE

Supreme Court of the United States

DON APPLEGATE, *et al.*

Petitioners,

v.

UNITED STATES,

Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. In an extensive line of cases, beginning with *Hensley* v. *Eckerhart*, 461 U.S. 424 (1983), this Court set forth detailed standards applicable to attorneys' fee petitions in statutory fee-shifting cases; however, this Court expressly limited those cases to attorneys' fee awards in *statutory fee-shifting* cases.

The first question presented by the petition is: Whether the Court of Federal Claims properly held—in conflict with this Court's decisions and the Seventh and Ninth Circuits—that the legal restrictions and prohibitions of statutory fee-shifting cases control the interpretation of a non-statutory, contractual settlement agreement calling for the payment of reasonable attorneys' fees.

2. In *Pennsylvania* v. *Delaware Valley Citizens Council for Clean Air*, 478 U.S. 546 (1986), and *Blum* v. *Stevenson*, 465 U.S. 886 (1984), this Court held that, in exceptional circumstances, a court can enhance an attorneys' fee award.

The second question presented by the petition is: Whether the Court of Federal Claims properly held—in conflict with this Court's decisions and the Fourth and Ninth Circuits—that attorneys' fee petitioners must satisfy an impossible legal standard for exceptionality that renders a nullity this Court's authorization of enhancement in exceptional cases.

PARTIES TO THE PROCEEDINGS AND RULE 29.6 STATEMENT

Petitioners Applegate, *et al.* were plaintiffs and appellants below. Respondent United States was defendant and appellee below.

Pursuant to S. Ct. Rule 29.6, none of the corporate Petitioners is owned by a parent corporation, nor is more than ten percent of any corporate Petitioner owned by any publicly held company.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners Don Applegate, *et al.* ("Applegate") respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Federal Circuit in this case.

OPINIONS BELOW

The decision of the Federal Circuit affirming without opinion the Court of Federal Claims's judgment is unreported and reprinted in the appendix hereto ("App.") at 1a. The opinion of the Court of Federal Claims is reported at 52 Fed. Cl. 751 and is reprinted at App. 3a.

JURISDICTION

The judgment of the Court of Appeals was entered on July 17, 2003. App. 2a. The jurisdiction of this Court rests on 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970, Section 4654(c) of Title 42 of the United States Code, provides:

> The Court rendering a judgment for the plaintiff in a proceeding brought under section 1346(a)(2) or 1491 of Title 28, awarding compensation for the taking of property by a Federal Agency, or the Attorney General effecting a settlement of any such proceeding, shall determine and award or allow to such plaintiff, as a part of such judgment or settlement, such sum as will in the opinion of the court or the Attorney General reimburse such plaintiff for his reasonable costs, disbursements, and expenses, including reasonable attorney, appraisal, and engineering fees, actually incurred because of such proceeding.

INTRODUCTION

On October 29, 1999, after seven years of litigation, Petitioners (who numbered over 300 individuals, cities and businesses in Brevard County, Florida) entered into a Settlement Agreement with the United States that marked the *first and only time* the United States has settled a beach erosion inverse condemnation case with both the payment of millions of dollars in damages and construction of a massive beach renourishment project. Moreover, the Settlement Agreement placed the burden solely upon Petitioners to "endeavor to obtain Congressional appropriations" for the beach renourishment project. Over the next three years, despite continued opposition, Petitioners obtained the necessary Congressional appropriations to secure construction of the

$42 million beach re-nourishment project. Petitioners waged this difficult battle on a wholly contingent fee basis, expending over 13,000 hours of attorney time. Appellants' Fed. Cir. Br. 2, 4, 5, 8, 17, 18.[1]

The Settlement Agreement provided that Petitioners were entitled to "recover reasonable attorneys' fees * * * incurred in connection with the Lawsuit * * * in an amount to be agreed to by the parties * * * or, failing agreement, as determined to be reasonable by [the court]." App. 6a. At the attorneys' fee hearing, undisputed testimony and Respondent's admissions established that Petitioners' contingent fee agreements were reasonable and that the fees incurred thereunder were actually incurred—the usual measures of reasonableness in inverse condemnation actions. Appellants' Fed. Cir. Br. 61; Fed. Cir. Reply Br. 28. Petitioners sought a reasonable fee of $5 million to $12.5 million based upon the value of benefits obtained by the settlement. Appellants' Fed. Cir. Br. 20. Rather than following the parties' contractual Settlement Agreement (which the court found to be independent of any fee-shifting statute) and reviewing for reasonableness the fee yielded by Petitioners' fee agreements, the lower court deemed itself bound by the prohibitions of this Court's statutory fee-shifting jurisprudence, limited itself to a severely restricted lodestar calculation, refused to consider the relevance of Petitioner's contingent fee agreements, and refused to award an enhancement for exceptional results on the grounds that Petitioners had not recovered anything more than they were owed. App. 23a-28a, 44a-47a.

Historically, this Court and the federal circuit courts have placed attorneys' fee petitions into three distinct categories: those based upon fee-shifting statutes, those involving

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[1] Throughout this petition, "Appellants' Fed. Cir. Br." and "Fed. Cir. Reply Br." refer to the Petitioners' Brief and Petitioners' Reply Brief, respectively, filed in the United States Court of Appeals for the Federal Circuit in this matter.

distribution from a common fund, and those based solely upon contractual agreements to pay reasonable attorneys' fees. *See Wing* v. *Asarco*, 114 F.3d 986, 989 (9th Cir. 1997). Of the three categories, fee-shifting is the most restrictive, limiting awards to hourly rates only and allowing enhancement over and above hourly rates only in exceptional circumstances. In the instant case, the lower court was faced with a contractual agreement for the payment of reasonable attorneys' fees that the lower court itself found to be independent of any fee-shifting statute. Rather than determine the reasonableness of the fee under the contingent fee agreements, however, the lower court applied the restrictions and prohibitions of this Court's fee-shifting jurisprudence to award a greatly reduced hourly fee that was less than Petitioners' attorneys would have been paid had they taken the case on a non-contingent fee basis.

This case first presents the question whether the restrictions and prohibitions announced by this Court in its numerous statutory fee-shifting decisions are applicable to an award of attorneys' fees under a non-statutory, contractual settlement agreement.

This Court first announced in *Hensley* v. *Eckerhart*, 461 U.S. 424, 433 n.7 (1983), that "[t]he standards set forth in this opinion are generally applicable in all cases *in which Congress has authorized an award of fees to a 'prevailing party.'* " (Emphasis added.) This principle—that fee-shifting principles apply solely to fee applications under fee-shifting statutes—resonates throughout the later cases decided by this Court, each beginning with *Hensley* and relying heavily upon detailed examinations of Congress's intent in enacting the statutes at issue. *See City of Burlington* v. *Dague*, 505 U.S. 557, 562, 565 (1992); *Blanchard* v. *Bergeron*, 489 U.S. 87, 91-95 (1989); *Pennsylvania* v. *Delaware Valley Citizens' Council*, 478 U.S. 546, 559-560 (1986) (*Delaware Valley I*); *Pennsylvania* v. *Delaware Valley Citizens' Council*, 483 U.S. 711, 723-724 (1987) (*Delaware Valley II*); *City of Riverside*

v. *Rivera*, 477 U.S. 561, 567 (1986); *Blum* v. *Stenson*, 465 U.S. 886, 893-896 (1984). Indeed, in *Gisbrecht* v. *Commissioner of Social Security*, 535 U.S. 789 (2002), this Court made a significant distinction between how fees are determined under fee-shifting statutes and how they are to be determined under 42 U.S.C. § 406(b), a non-fee-shifting statute authorizing a percentage recovery.

In keeping with this Court's decisions, both the Seventh and Ninth Circuits have squarely held that, in the context of a written settlement agreement providing for an award of reasonable attorneys' fees to one party, neither statutory fee-shifting principles nor common fund principles control the determination of fees. *See Wing* v. *Asarco*, 114 F.3d 986 (9th Cir. 1997); *Dutchak* v. *Central States, Southeast & Southwest Areas Pension Fund*, 932 F.2d 591 (7th Cir. 1991). Rather, those courts held that such a fee award is a matter of contract interpretation alone.

In conflict with this Court's decisions and those of the Seventh and Ninth Circuits, the Court of Federal Claims applied the restrictions developed for statutory fee-shifting cases to this contractual fee application, despite finding that there was "not a shred of evidence that suggests * * * the parties intended that the determination of a 'reasonable' attorneys fee would be controlled by the URA."[2] In fact, the Court of Federal Claims held that the parties' Settlement

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[2] "URA" is the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970, 42 U.S.C. § 4654(c). The URA would have applied to this inverse condemnation case had it proceeded to trial and judgment. Under the URA, the Attorney General is required to reimburse prevailing plaintiffs for their "reasonable" fees and costs that are "actually incurred." One factor the court considers in determining what is reasonable under the URA is the plaintiffs' contingent fee agreements. *See Osprey Pacific Corp.* v. *United States*, 42 Fed. Cl. 740 (1999), *appeal dismissed*, 215 F.3d 1344 (Fed. Cir. 1999) (voluntarily dismissed pursuant to Federal Rule of Appellate Procedure 42(b)).

Agreement required it "to determine a 'reasonable' fee independent of any alleged limitations associated with the URA." App. 11a, 15a; S. Ct. Rule 10(a), (c). Despite this Court's observation almost a century ago that "[a] Government contract should be interpreted as are contracts between individuals, with a view to ascertaining the intention of the parties and to give it effect accordingly, if that can be done consistently with the terms of the instrument," *Hollerbach* v. *United States*, 233 U.S. 165, 171-172 (1914), the lower court bound itself to "severely restricting" statutory fee-shifting principles, App. 19a, and refused to consider the reasonableness of the contingent fee agreements, as is done in inverse condemnation cases. *See Osprey Pacific Corp.*, 42 Fed. Cl. at 742-743.

Even if the Court of Federal Claims was entitled to apply fee-shifting restrictions and prohibitions to Petitioners' fee petition, this case further presents the question whether and under what standards an attorneys' fee petitioner is entitled to a fee enhancement in an exceptional case.

This Court has repeatedly stated that, where fee-shifting statutes apply, fee enhancement is warranted in exceptional cases. *See Delaware Valley I*, 478 U.S. at 565 (finding enhancement proper in rare and exceptional cases); *Blum*, 465 U.S. at 897 (citing *Hensley*, 461 U.S. at 435 (concluding enhanced award justified in cases of exceptional success)). The Court of Federal Claims's adoption of an impossible standard for exceptionality would render a nullity this Court's clear intent to allow enhancements for exceptional results. S. Ct. Rule 10(c).

In addition to conflicting with this Court's precedent, the Court of Federal Claims's standard for exceptionality conflicts with the decisions of the Fourth and Ninth Circuits. S. Ct. Rule. 10(a). In a case where plaintiffs obtained results similar in scope and effect to those at issue here, the Fourth Circuit approved a results "enhancement" to fees to be paid

by defendant, though the relief ordered was no more than that sought by plaintiffs. *See Hyatt* v. *Apfel*, 195 F.3d 188 (4th Cir. 1999). The Ninth Circuit has measured exceptionality not based on whether a plaintiff in a particular case has achieved more than it set out to achieve, but rather based on an assessment of the exceptional efforts and achievements of counsel in the case as presented. *See Wing*, 114 F.3d at 989.

This case raises important questions of federal contract law. The United States Court of Federal Claims is a court of National jurisdiction. *See Branning* v. *United States*, 7 Cl. Ct. 777, 783 (1985). Thus, its decisions—and those of the United States Court of Appeals for the Federal Circuit—have National implications. Imposing cases construing Congressional intent upon voluntary agreements of the Executive Branch undermines the sanctity of the government's contractual agreements, interjects uncertainty into federal contract law, and deprives Petitioners of the benefit of their bargain. Moreover, as this Court has previously observed, public policy wisely encourages settlement. *See McDermott* v. *AmClyde*, 511 U.S. 202, 215 (1994). Allowing a decision to stand that adds unbargained-for terms to a parties' settlement agreement, derived not from the parties' intent but from Congressional intent, would inject uncertainty into the settlement process, discourage settlement, and thwart public policy.

STATEMENT OF THE CASE

Background. On December 4, 1992, Petitioners filed suit against Respondent seeking just compensation for forty years of extensive erosion to their beachfront properties caused by the government's construction and operation of Canaveral Harbor in Brevard County, Florida. On June 14, 1993, the Court of Federal Claims dismissed Petitioners' complaint on statute of limitations grounds. *See Applegate* v. *United States*, 28 Fed. Cl. 554 (1993). Petitioners appealed the trial court's dismissal, and the Federal Circuit reversed. *Apple-*

gate v. *United States*, 25 F.3d 1579 (Fed. Cir. 1994). Thereafter, after seven years of contested litigation, on October 29, 1999, Petitioners entered into an unprecedented Settlement Agreement with Respondent, marking the *first and only time* the United States has settled a beach erosion inverse condemnation case with both the payment of millions of dollars in damages and a massive beach re-nourishment project.[3] Moreover, the Settlement Agreement placed the burden solely upon Petitioners to "endeavor to obtain Congressional appropriations" for the beach re-nourishment project.[4] Over the next three years, despite continued opposition,[5] Petitioners obtained such Congressional appropriations and secured construction of the $42 million beach re-nourishment project. Petitioners waged this difficult battle on a wholly contingent fee basis, expending over 13,000 hours of attorney time. Appellants' Fed. Cir. Br. 2, 4, 5, 8, 17, 18.

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[3] The United States paid $5 million in damages under the Settlement Agreement, plus interest from the date of settlement and attorneys' fees and costs. The Settlement Agreement also resulted in a beach re-nourishment project costing $42 million. Appellants' Fed. Cir. Br. 2, 4, 21. The benefit to beachfront property values as a direct result of the project totaled $220 million. Fed. Cir. Reply Br. 5 n.1.

[4] The Settlement Agreement provided it would not be effective unless and until Congress appropriated at least $8.5 million of the Federal funds for the re-nourishment project, an appropriation the U.S. Army Corps of Engineers opposed. Appellants' Fed. Cir. Br. 16-17, 18 n.8. This placed a double risk of non-payment upon counsel for Petitioners—first under their contingent fee agreements and second under the contingency of Congressional appropriation.

[5] Prior to and throughout the litigation, the U.S. Army Corps of Engineers vehemently opposed construction of the Brevard County re-nourishment project. Appellants' Fed. Cir. Br. 8, 33. Indeed, on the very day the Settlement Agreement was executed, Respondent advised Petitioners by letter that "the current administration does not support the funding of beach renourishment projects." Appellants' Fed. Cir. Br. 17.

Attorneys' Fee Proceedings. The Settlement Agreement provided that "Plaintiffs are entitled to recover reasonable attorneys' fees * * * incurred in connection with the Lawsuit * * * in an amount to be agreed to by the parties * * * or, failing agreement, as determined to be reasonable by the United States Court of Federal Claims Judge Lawrence S. Margolis."[6] App. 6a. After Judge Margolis recused himself, the case was assigned to Judge Francis M. Allegra, who conducted an evidentiary hearing on January 29 and 30, 2002. Appellants' Fed. Cir. Br. 19. At the evidentiary hearing, Petitioners presented evidence supporting a reasonable fee of $5 million to $12.5 million, based upon the value of the benefits obtained. Appellants' Fed. Cir. Br. 20.

Fee Award. In its opinion, the Court of Federal Claims first correctly observed that "as a matter of simple contract interpretation, there is no indication that the Agreement incorporated the attorney's fee provisions in the URA. An agreement to settle a legal dispute is a contract, the interpretation of which is governed by familiar principles." App. 10a. The court found there to be "no ambiguity in the contract itself," and concluded that "there is not a shred of evidence that suggests either that the parties intended that the determination of a 'reasonable' attorneys fee would be controlled by URA, or even that defendant somehow unilaterally expressed or reserved this point." App. 11a & n.6 Finally, the court conclusively stated:

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[6] The fee in this case is not a court "awarded" fee. Petitioners' entitlement to recover their incurred fees derives solely from the contractual agreement of the parties. Petitioners' entitlement has no statutory basis nor does it derive from equitable entitlement resulting from creation of a common fund. The trial judge's sole duty authorized by the parties' agreement was to determine the reasonable amount of the incurred fees Petitioners were entitled to recover failing an agreement of the parties as to the amount.

> [T]his court readily concludes that the Agreement simply requires it to determine a "reasonable" fee independent of any alleged limitations associated with the URA. App. 15a.

Nevertheless, the lower court found that "this case should be guided by statutory-fee shifting principles,"[7] App. 23a, and severely restricted Petitioners' fee petition using the statutory fee-shifting prohibitions developed by this Court in *Dague*, *Blanchard*, *Delaware Valley I*, *Blum*, and *Hensley*.[8] App. 23a-28a. The lower court concluded that it was bound by those decisions to reject any consideration of the reasonableness of Petitioners' contingent fee agreements, despite undisputed evidence and Respondent's admissions to the contrary,[9] and instead applied this Court's fee-shifting restrictions and prohibitions as if the case before it was a statutory fee-shifting case. Moreover, in denying Petitioners' request for an exceptional results enhancement to the lodestar, the lower court adopted an impossible standard for exceptionality that precludes a "results enhancement" unless the petitioner achieves a result other than the one sued for

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[7] The court further affirmed that "the principles applicable in fee-shifting cases * * * shall be applied by this court." App. 22a-23a.

[8] In particular, the Court of Federal Claims stated that nothing about the instant case set it apart from *Dague*. App. 27a n.20.

[9] At the evidentiary hearing, undisputed testimony and Respondent's admissions established that Petitioners' contingent fee agreements were reasonable and that all fees thereunder were actually incurred. Appellants' Fed. Cir. Br. 61; Fed Cir. Reply Br. 28. If Claims Court precedent had been properly applied, this should at least have been a *factor* in considering reasonableness. *See Osprey Pacific Corp.*, 42 Fed. Cl. at 742 ("[W]here there is sufficient evidence that the contingent fee is 'reasonable' in light of the complexity and time requirements of the case, a plaintiff may recover attorney fees based on a contingency agreement.").

and greater than that which is owed. The Court articulated this new standard as follows:

> The results so depicted, while remarkable, are, nonetheless, precisely what plaintiffs set out to accomplish in filing this suit. Accordingly, measured by plaintiffs' own expectations at the outset of the case, the results obtained were not exceptional, but rather reflect what was owed. App. 46a.

The Federal Circuit affirmed without opinion the decision of the Court of Federal Claims on July 17, 2003. App. 1a.

REASONS FOR GRANTING THE WRIT

I. THE COURT OF FEDERAL CLAIMS'S DECISION CONFLICTS WITH DECISIONS OF THIS COURT AND OTHER FEDERAL COURTS OF APPEALS ON THE APPLICABILITY OF STATUTORY FEE-SHIFTING RESTRICTIONS AND PROHIBITIONS TO AN AWARD OF ATTORNEYS' FEES UNDER A NON-STATUTORY, CONTRACTUAL SETTLEMENT AGREEMENT.

1.a. This Court first announced in *Hensley*, 461 U.S. at 433 n.7, that "[t]he standards set forth in this opinion are generally applicable in all cases *in which Congress has authorized an award of fees to a 'prevailing party.'* " (Emphasis added.) This principle that fee-shifting principles apply solely to fee petitions under fee-shifting statutes resonates throughout the later cases decided by this Court, all of which have *Hensley* as their starting point and all of which rely heavily upon detailed examinations of Congressional intent in enacting the statutes at issue. *See Dague*, 505 U.S. at 562, 565; *Blanchard*, 489 U.S. at 91-95; *Delaware Valley I*, 478 U.S. at 559-560; *Delaware Valley II*, 483 U.S. at 723-724; *Rivera*, 477 U.S. at 567; *Blum*, 465 U.S. at 893-896. The Court of Federal Claims is the only court to reject this well-established jurisprudence and to hold that this Court's fee-shifting cases are binding upon parties to a settlement agreement that

incorporates no fee-shifting statute. In doing so, the Court of Federal Claims, and the Federal Circuit through its affirmance, created a conflict with the Court's established jurisprudence and impermissibly engrafted Congressional intent upon the parties' Settlement Agreement.

In *Hensley*, this Court first began to develop the body of modern law pertaining to fee awards under fee-shifting statutes. This Court exhaustively examined Congress's intent in enacting 42 U.S.C. § 1988 before delimiting the boundaries of its decision:

> The standards set forth in this opinion are generally applicable in all cases in which Congress has authorized an award of fees to a "prevailing party." *Hensley*, 461 U.S. at 433 n.7.[10]

b. Several cases followed *Hensley*, and in each this Court began its analysis of the fee-shifting statutes in question by determining Congress's intent. *See Ruckelshaus* v. *Sierra Club*, 463 U.S. 680, 686 (1983) (Court adopts "most reasonable interpretation of Congressional intent" with respect to 42 U.S.C. § 7607(f).); *Blum*, 465 U.S. at 896 (Resolution of question "turns on a statute and the intention of Congress."); *Rivera*, 477 U.S. at 580 ("Congress intended that statutory fee awards be 'adequate to attract competent counsel, but * * * not produce windfalls to attorneys.' " (citation omitted)); *Delaware Valley I*, 478 U.S. at 565 ("[S]trong presumption that the lodestar * * * represents a 'reasonable' fee is wholly consistent with the rationale behind the usual fee-shifting statute, including the one in the present case."); *Delaware Valley II*, 483 U.S. at 726 ("We are unconvinced that Congress intended the risk of losing a lawsuit to be an independent basis for increasing the amount of any otherwise

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[10] This principle was reaffirmed in *Dague*, 505 U.S. at 562 ("[C]ase law construing what is a 'reasonable' fee applies uniformly to all [fee-shifting statutes].").

reasonable fee."); *Blanchard*, 489 U.S. at 93 (Automatic ceiling on award "would be inconsistent with the statute and its policy and purpose."); *Dague*, 505 U.S. at 565 ("[N]o contingency enhancement whatever is compatible with the fee-shifting statutes at issue.").

In fact, just last Term, in *Gisbrecht*, 535 U.S. at 809. this Court instructed that, in the absence of statutorily created fee-shifting restrictions, lawful attorney-client fee agreements take primacy over statutory fee-shifting schemes and courts must simply "review for reasonableness fees yielded by those agreements." *Gisbrecht* involved an award of attorneys' fees under 42 U.S.C. § 406(b), which provided that a prevailing claimant's fees would be payable "out of the benefits recovered; in amount, such fees may not exceed 25 percent of past-due benefits."[11] *Id.* at 792. The lower court, in conflict with other circuit courts, had awarded fees based upon the body of case law governing fee-shifting statutes. This Court framed the issue in *Gisbrecht* in similar fashion to that faced by the Court of Federal Claims in this case:

> What is the appropriate starting point for judicial determinations of "a reasonable fee for [representation before the court]"? Is the contingent-fee agreement between claimant and counsel, if not in excess of 25 percent of past-due benefits, presumptively reasonable? Or should courts begin with a lodestar calculation (hours reasonably spent on the case times reasonable hourly rate) of the kind we have approved under statutes that shift the obligation to pay to the loser in the litigation? *Id.* (internal citations omitted).

Despite concluding that "the lodestar method today holds sway in federal-court adjudication of disputes over the

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[11] Similarly, Petitioners' fee agreements here provided for payment of "one-third (1/3) of the value of the benefits obtained." App. 4a.

amount of fees properly shifted to the loser in the litigation," this Court rejected application of the lodestar method to Gisbrecht's fee petition because 42 U.S.C. § 406(b) was not a fee-shifting statute. This Court stated:

> Fees shifted to the losing party, however, are not at issue here. Unlike 42 U.S.C. § 1988 (1994 ed. and Supp. V) and EAJA, 42 U.S.C. § 406(b) (1994 ed., Supp. V) does not authorize the prevailing party to recover fees from the losing party. Section 406(b) is of another genre: It authorizes fees payable from the successful party's recovery. *Id.* at 802.

Thus, this Court held that 42 U.S.C. § 406(b) did not "override customary attorney-client contingent-fee agreements." *Id.* at 808. Rather, courts must simply "review for reasonableness fees yielded by those agreements." *Id.* at 809. As a result, this Court reversed for recalculation of attorneys' fees under the contingent fee agreements:

> Because the decision before us for review rests on lodestar calculations and rejects the primacy of lawful attorney-client fee agreements, we reverse the judgment below and remand for recalculation of counsel fees payable from the claimants' past-due benefits. *Id.* at 793.

Gisbrecht aptly demonstrates that the body of case law developed by this Court in *Hensley* and its progeny is applicable only to awards of fees under fee-shifting statutes. Where contingent fee agreements exist and no fee-shifting statute applies, the reasonableness of the Petitioners' contingent fee agreements must be considered and the primacy of lawful attorney-client fee agreements cannot be overridden by statutory fee-shifting considerations.[12] Instead, the court

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[12] The significance of this primacy cannot be overstated. Numerous federal courts have recognized that, absent statutory restrictions, a reasonable fee for a lawyer who is paid promptly as litigation progresses is not a reasonable fee for a lawyer who bears

must review for reasonableness the fees yielded by those agreements.[13] Thus, the Court of Federal Claims's application of the fee-shifting restrictions and prohibitions of *Hensley* and its progeny to the non-statutory, contractual Settlement Agreement in this case, in the face of its finding that "there is not a shred of evidence that suggests * * * that the determination of a 'reasonable' attorneys fee would be

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the risk of non-payment if unsuccessful, as well as the delays and costs attendant thereto. *See Dague*, 505 U.S. at 567 (Blackmun, J., joined by Stevens, J., dissenting) ("[I]t is a fact of the market that an attorney who is paid only when his client prevails will tend to charge a higher fee than one who is paid regardless of outcome, and relevant professional standards long have recognized that this practice is reasonable."); *Delaware Valley II*, 483 U.S. at 736 (Blackmun, J., joined by Brennan, Marshall & Stevens, J.J., dissenting) (Contingency cases "are inherently riskier and an attorney properly may expect greater compensation for their successful prosecution."); *In re Washington Public Power Supply Sys. Sec. Litig.* (*WPPSS*), 19 F.3d 1291, 1299 (9th Cir. 1994) (Established practice in private legal market to reward attorneys for taking risk of non-payment by paying a premium over normal hourly rates.); *Wildman* v. *Lerner Stores Corp.*, 771 F.2d 605, 612 (1st Cir. 1985) (Significant difference between a "case taken on a full retainer and a case in which an attorney spends many hours over a period of months or years with no assurance of any pay if the suit is unsuccessful."). In keeping with the above judicially-recognized reality, absent the restrictions of this Court's fee-shifting jurisprudence, a reasonable fee in the instant case would necessarily have been greater than the fee the lower court awarded.

[13] In *Osprey Pacific Corp.*, 42 Fed. Cl. 742-743, the Court of Federal Claims held that a contingent fee agreement between a petitioner and its client was a central factor in the court's analysis of "reasonable fees" that were "actually incurred." There is no dispute that the contingent fee agreements here were reasonable and the fees were actually incurred. *See supra* n.9.

controlled by the URA," is contrary to the jurisprudence of this Court.[14] App. 11a.

Contrary to the Court of Federal Claims's decision in this case, in none of the above cases did this Court hold that the body of law pertaining to fee-shifting statutes has equal application to voluntary contractual agreements to pay reasonable attorneys' fees. And with good reason. Doing so would improperly engraft Congressional intent upon an otherwise independent contractual agreement and impair the right of freedom of contract.

c. This Court has repeatedly held that lawful Government contracts must be interpreted as are contracts between individuals. The law of contracts governs, not the intent of Congress in some uncited, unmentioned statute. *See United States* v. *Standard Rice Co.*, 323 U.S. 106, 111 (1944) ("United States as a contractor must be treated as other contractors under analogous situations. When problems of the interpretation of its contracts arise the law of contracts governs."); *United States* v. *American Surety Co.*, 322 U.S. 96, 102 (1944) (Courts "are not justified in rewriting clear

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[14] The language of the Settlement Agreement, which provided that the lower court was to award fees "incurred in connection with the Lawsuit * * * as determined to be reasonable by the [court]," is in accord with the rule of law set forth in *Gisbrecht*. App. 6a. In the absence of fee-shifting restrictions, *Gisbrecht* instructs that the lower court should have reviewed for reasonableness the fees yielded by the Petitioners' fee agreements. Undisputed evidence and the admissions of Respondent established that Petitioners' contingent fee agreements were reasonable and that all fees thereunder were actually incurred. Appellants' Fed. Cir. Br. 61; Fed. Cir. Reply Br. 28. Yet the lower court, because it erroneously believed itself bound by inapplicable fee-shifting restrictions and prohibitions, failed to even consider the reasonableness of the fees yielded by Petitioners' fee agreements. Under *Gisbrecht*, however, the lower court could not properly ignore the Petitioners' fee agreements in reaching its decision.

provisions of contract to include what might well have been but was not inserted."). Indeed, almost one hundred years ago, this Court gave clear instruction as to the manner in which the lower court was required to interpret the parties' Settlement Agreement in this case:

> A Government contract should be interpreted as are contracts between individuals, with a view to ascertaining the intention of the parties and to give it effect accordingly, if that can be done consistently with the terms of the instrument. *Hollerbach*, 233 U.S. at 171-172.

In the instant case, the lower court first properly ascertained the parties' intent, concluding that:

> [A]s a matter of simple contract interpretation, there is no indication that the Agreement incorporated the attorney's fee provisions in the URA. An agreement to settle a legal dispute is a contract, the interpretation of which is governed by familiar principles. App. 10a.

The Court found there to be "no ambiguity in the contract itself," and concluded that "there is not a shred of evidence that suggests either that the parties intended that the determination of a 'reasonable' attorneys fee would be con-trolled by the URA, or even that defendant somehow unilaterally expressed or reserved this point." App. 11a & n.6. Finally, the court conclusively stated:

> [T]his court readily concludes that the Agreement simply requires it to determine a "reasonable" fee independent of any alleged limitations associated with the URA. App. 15a.

Nevertheless, rather than determining and applying the parties' intent that no statutory limitations apply to the determination of a reasonable fee, the lower court found that "this case should be guided by statutory-fee shifting principles." App. 23a. Thereupon, the lower court examined the

law of fee-shifting jurisprudence as developed by this Court in *Hensley* and its progeny and incorrectly applied restrictions from those cases to Petitioners' fee petition.[15] App. 23a-28a. In doing so, the lower court improperly engrafted Congressional intent upon the parties' contractual agreement and erroneously extended this Court's fee-shifting jurisprudence beyond the boundaries clearly established by this Court.

2.a. The Court of Federal Claims's decision also directly conflicts with decisions of the Seventh and Ninth Circuits. Both the Seventh and Ninth Circuits have squarely held that, in the context of a written settlement agreement providing for an award of reasonable attorneys' fees to one party, neither statutory fee-shifting principles nor common fund principles bind the court. *Wing*, 114 F.3d at 989; *Dutchak*, 932 F.2d at 594. Rather, such a fee award is a matter of contract interpretation alone.

In *Wing*, the plaintiffs brought a class action against the defendant for alleged violations of federal environmental pollution statutes. The parties executed a $67.5 million settlement agreement, including $60.5 million in cash "which was not guaranteed, but would come from [defendant's] potential recovery on an insurance claim." *Id.* at 988.

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[15] Without regard to the fact that there was no fee-shifting statute at issue, the lower court even noted that nothing about the instant case set it apart from *Dague*. App. 27a n.20. *Dague*, however, is particularly illustrative of the manner in which fee-shifting cases are inapposite to the case at bar, because the most significant underpinning of the rationale for the *Dague* Court's rejection of enhancement for risk—that lawyers seeking enhancement for risk under fee-shifting statutes would subsidize losing cases with winning ones—is not applicable at all to the instant case. Undisputed testimony at trial demonstrated that this was an extraordinary case for Petitioners' law firm, constituting "the first and only inverse condemnation case * * * ever taken on a contingency." Appellants' Fed. Cir. Br. 61.

Additionally, as here, the defendant contractually agreed "to pay the reasonable attorney fees and expenses of class counsel, as determined by the court, [which defendant] agreed to pay directly, rather than detracting from the recovery given to the class." *Id.* at 987-988. Relying upon the parties' contract, the district court noted the total benefits obtained (both guaranteed and not) and "determined that a fee of $8 million was 'fair and reasonable.' " *Id.* at 988.

On appeal, the defendant argued that the district court's fee award was erroneously based upon the parties' contracts rather than the "body of law pertaining to statutory fee awards." *Id.* at 987. Thus, the Ninth Circuit framed the issue in identical fashion to that facing the Court of Federal Claims in the instant case:

> We consider what constitutes a reasonable attorney fee in the context of a written settlement agreement and whether the body of law pertaining to statutory fee awards or "common fund" cases has application here. *Id.* at 987.

But unlike the Court of Federal Claims, the Ninth Circuit made clear that the fee dispute was governed solely by contract, and not statutory, principles:

> At the outset, we note that the fee dispute in this case arises out of contract: in the Settlement Agreement, [defendant] agreed to pay the reasonable attorney fees and expenses as determined and awarded by the court. The Attorney Fee Agreement did not limit the district court's discretion in determining the fee * * * . Under the Settlement Agreement, the only constraint on the district court's discretion was the requirement that the fee be "reasonable. *Id.* at 988.

Because the only contractual limitation upon the district court's discretion was that the fee be reasonable, the Ninth Circuit, in sharp contrast to the Court of Federal Claims in

this case, declined to pigeonhole the dispute as either fee shifting or common fund:

> We recognize that this situation is neither fish nor fowl nor fair weather game; i.e., neither *Dague* (in that the fee-shifting is voluntary and contractual rather than statutorily-mandated) nor *WPPSS* (in that class counsel's fee would come from the defendant directly and not out of the class recovery). *Id.* at 989.

Whereupon, the Ninth Circuit correctly found that the parties' settlement agreement alone provided the adequate, bargained-for basis for the fee award independent of any limitations contained in the body of law pertaining to statutory fee awards. Thus, *Wing* is squarely in conflict with the decision of the Court of Federal Claims in this case.

b. Similarly, in *Dutchak*,, 932 F.2d at 595, the plaintiffs brought a class action against the defendant pension fund administrator for alleged ERISA violations. The parties' settlement agreement authorized the court to award attorneys' fees in accordance with "factors" listed in four specific federal cases, as well as "other relevant federal court decisions based thereon." *Id* at 593. As a result, the district court limited its discretion to the specified case law, applied a multiplier of two to the lodestar, and entered a fee award of $5 million. In basing its decision upon the parties' contract, the court explained that "[t]he settlement agreement provisions set forth the standards to be applied, and the [defendant] is obligated to pay and Plaintiffs' attorneys are entitled to receive appropriate fees under those standards, no more and no less." *Id.* at 595.

On appeal, as here, the defendant argued that statutory fee-shifting principles controlled and therefore the multiplier awarded violated Supreme Court precedent prohibiting multipliers in statutory fee-shifting cases. *Id.* The defendant contended this precedent—though not specified in the agreement—was nevertheless relevant under the "other

relevant federal court decisions based thereon" phrase. *Id.* at 593. The defendant asserted that "this phrase require[d] inclusion of subsequent decisions not only interpreting but perhaps altering the holdings of the four named cases." *Id.* at 595.

The Seventh Circuit rejected this argument, finding the fee dispute to be purely and solely "a matter of contract interpretation." *Id.* at 594. The court reasoned:

> [D]efendants and plaintiffs have agreed that plaintiffs' attorneys are to be paid by applying principles in the settlement, and the court's job is to interpret the contract's meaning * * * . Instead of classifying the case as "common fund" or "fee shifting," [the court] must plumb the language of the settlement to determine its meaning and, if ambiguous, to determine the parties' intent. *Id.* at 594-595.

Applying familiar contract principles, the Seventh Circuit found the defendant's position "inconsistent with the settlement. The settlement limited the discretion of the judge in determining the appropriate level of attorneys' fees. For the judge later to consider cases overruling or changing the standards of the four named controlling cases would destroy the certainty for which both parties bargained." *Id.* Because the specified cases uniformly authorized lodestar multipliers, the district court properly "interpreted the settlement according to its terms and in accord with the parties' intent." *Id.* at 598.

Dutchak stands for the important proposition that when litigants contractually agree to a fee award under a settlement agreement, statutory fee shifting principles do not apply unless the parties so intended. Under *Dutchak*, the fee award at issue was a matter of contract interpretation governed by the parties' Settlement Agreement, not by the body of law pertaining to statutory fee awards. Thus, *Dutchak* is squarely

in conflict with the decision of the Court of Federal Claims in this case.

Both *Wing* and *Dutchak* illustrate that where a contractual agreement provides for the payment of attorneys' fees, the fee award is governed by the parties' contract, not by the body of law pertaining to statutory fee awards. The Court of Federal Claims in this case, however, despite concluding that "there is not a shred of evidence that suggests * * * the parties intended that the determination of a 'reasonable' attorneys fee would be controlled by the URA," and despite holding that "this court readily concludes that the Agreement simply requires it to determine a 'reasonable' fee independent of any alleged limitations associated with the URA," still held that its consideration of the Petitioners' fee award was limited by the body of law pertaining to statutory fee awards. App. 11a, 15a. Thus, the Federal Circuit's affirmance of the Court of Federal Claims's decision creates a circuit split that can only be resolved by this Court.

II. THE COURT OF FEDERAL CLAIMS'S DECISION CONFLICTS WITH DECISIONS OF THIS COURT AND THE FOURTH AND NINTH CIRCUITS ON THE STANDARD UNDER WHICH A PLAINTIFF IS ENTITLED TO FEE ENHANCEMENT IN AN EXCEPTIONAL CASE.

Even if the Court of Federal Claims was entitled to apply this Court's jurisprudence regarding fee-shifting statutes to the Settlement Agreement, it used an improper and impossible standard that conflicts with other courts' application of the "exceptional results" factor.

1. This Court clearly intends that plaintiffs' attorneys be able to achieve a results enhancement in exceptional cases. *See Delaware Valley I*, 478 U.S. at 565 (finding enhancement proper in rare and exceptional cases); *Blum*, 465 U.S. at 897 (citing *Hensley*, 461 U.S. at 435 (concluding enhanced award justified in cases of exceptional success)). The lower court,

however, effectively precluded plaintiffs' attorneys from ever recovering a results enhancement by creating an impossible standard that requires attorneys to either plead their cases improperly or forego any fee enhancement for an exceptional result.

In its Order on Attorneys Fees, the lower court concluded that:

> [I]t is far from clear that the results here are exceptional * * * . [Although] [i]n pure dollar terms, of course, the settlement here is considerable * * * [t]he results so depicted, while remarkable, are, nonetheless, precisely what plaintiffs set out to accomplish in filing this suit. Accordingly, measured by plaintiffs' own expectations at the outset of this case, the results obtained were not exceptional, but rather reflect what was owed. App. 45a-46a.

To make a case for exceptionality, this standard requires plaintiffs to adduce evidence that they achieved something other than they desired to accomplish in filing suit, as well as that they achieved more than a court could lawfully award in judgment. Such a standard is incorrect. According to the lower court's standard, a plaintiff could achieve a stunning landmark victory against impossible odds, triumph where no one had ever dared venture, recover one hundred percent of the relief sought, and still have the result be deemed unexceptional simply because the plaintiff achieved what it set out to achieve and nothing more. More to the point, by the lower court's reasoning, the fact that the United States landed a man on the moon in 1969 was not exceptional because the United States simply achieved what it set out to accomplish and did not land on a planet as well.

Under the Federal Rules of Civil Procedure, a plaintiff must specifically plead for all relief sought. *See* Fed. R. Civ. P. 8(a) ("A pleading which sets forth a claim for relief * * *

shall contain * * * a demand for judgment for the relief the pleader seeks."); Fed. R. Civ. P. 9(g) ("When items of special damage are claimed, they shall be specifically stated."). At the same time, Rule 11 provides for sanctions against parties (and counsel) who assert claims for relief without an evidentiary basis at the time of filing. *See* Fed. R. Civ. P. 11(b). Thus, to satisfy the new Court of Federal Claims legal standard for exceptionality, future counsel must either *over*-plead the case at the risk of sanctions, or *under*-plead the case at the risk of waiving claims for relief and hence malpractice. Because this standard actually penalizes counsel for doing their homework and properly pleading the case in compliance with the Federal Rules of Civil Procedure, it is clearly erroneous as a matter of law. Fee enhancement in exceptional cases cannot require litigants to violate the Federal Rules of Civil Procedure.

2. Moreover, this standard conflicts with the analysis used by other courts in evaluating exceptional results enhancements. For example, in *Hyatt*, the Fourth Circuit approved an "exceptional result[]" multiplier where "plaintiffs have succeeded in forcing the Social Security Administration to halt application of a secret, unlawful policy to its determination of hundreds of thousands of disability claims in North Carolina and, perhaps, to many hundreds of thousands more outside of North Carolina." 195 F.3d at 191-192. Although discontinuing the "secret, unlawful policy" was the basis for the lawsuit and the result sought by the plaintiffs, this did not preclude a finding of exceptionality. *See id.*[16]

Furthermore, the Court of Federal Claims's decision conflicts with that of the Ninth Circuit in *Wing*, 114 F.3d at 989.

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[16] Although the *Hyatt* case ultimately brought the same benefit to a greater number of people than those included in the original class, no less is true of the result obtained in this case, which benefited numerous public and private beachfront property owners in addition to Petitioners. Appellants' Fed. Cir. Br. 28.

Faced with a similar contractual settlement agreement, the court addressed the issue based upon the specific facts before it, just as the Court of Federal Claims has held fee petitions should be viewed. *See Erickson* v. *Secretary, Dept. of Health & Human Services*, 1999 WL 1268149, at *6 (Fed. Cl. Dec. 10, 1999) ("[E]very fees petition must be decided on a case by case basis."). In *Wing*, the Ninth Circuit examined the record carefully, noting that the District Court had stressed "the first-rate job the lawyers did, their sheer endurance, and the exceptional results obtained, which the court viewed as especially remarkable in light of the quality of opposition counsel and [defendant's] record of success in this type of litigation."[17] *Id.* at 989. Accordingly, the *Wing* court affirmed the district court's application of an exceptional results multiplier.

Thus, the lower court's decision in this case is not only contrary to this Court's jurisprudence, but is also contrary to that of the Fourth and Ninth Circuits.

III. THE QUESTIONS PRESENTED ARE IMPORTANT AND RECURRING.

The United States Court of Federal Claims is a court of National jurisdiction. *See Branning*, 7 Cl. Ct. at 783. Pursuant to the Tucker Act, 28 U.S.C. § 1491, the Court of Federal Claims has jurisdiction over all claims for money damages arising out of contracts of the United States. Thus, its decisions—and those of the United States Court of Appeals for the Federal Circuit—not only have National implications, but have far-reaching impact upon federal contract

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[17] The *Wing* court further justified the multiplier award on the basis of "counsel's continuing obligations to the class," *id.* at 989, a factor also present in the instant case. Appellants' Fed. Cir. Br. 18.

law.[18] Viewed in this light, it is clear that the rule of law adopted by the Court of Federal Claims and the Federal Circuit would undermine the law of federal contracts.

In the instant case, the lower court found there to be "not a shred of evidence that suggests * * * the parties intended that the determination of a 'reasonable' fee would be controlled by the URA." App. 11a. Nevertheless, the court went on to decide that "this case should be guided by *statutory*-fee shifting principles." App. 23a (emphasis added). This decision engrafted Congressional intent upon the interpretation of a contractual agreement in a situation where the parties had unquestionably not intended such intent to apply. Such a far-reaching decision stands traditional rules of contract interpretation upon their head.

This Court stated in *Standard Rice*, 323 U.S. at 111, that the "United States as a contractor must be treated as other contractors under analogous situations. When problems of the interpretation of its contracts arise the law of contracts governs." A judicially created rule that would effectively allow Congress to unilaterally modify and engraft a contrary intent upon the Executive Branch's lawful contractual agreements would erode confidence in contracts of the United States.

The implications of such a rule extend into the private sector as well. If the United States, whose contracts are as subject to the law of contracts as are those of private parties, is allowed to engraft an unbargained-for and contrary intent upon its agreements by legislative enactment, then legislative enactment could also be utilized to engraft Congressional intent upon lawful private agreements. Thus, no contractual agreement would be safe from interpretation completely

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[18] This is particularly true where, as here, the Court of Federal Claims publishes its decision as important nationwide precedent. *See Applegate* v. *United States*, 52 Fed. Cl. 751 (2002).

contrary to the original intent of the parties as expressed in the bargained-for terms of their agreement.

Public policy wisely encourages settlement. *See McDermott*, 511 U.S. at 215. Where two parties have entered into a lawful settlement agreement, they must have confidence that their agreement will be interpreted as intended by the parties. This is especially true where one of those parties is the government. *See generally Standard Rice*, 323 U.S. at 111; *American Surety*, 322 U.S. at 101; *Hollerbach*, 233 U.S. at 171-172. Injecting uncertainty into the settlement process will discourage settlement and thwart public policy. Here, rather than honoring the bargained-for contract terms agreed to by the parties, the lower court imposed unbargained-for fee-shifting restrictions and prohibitions upon Petitioners' fee award. Such a decision is contrary to the long-standing jurisprudence of this Court.

The second question presented also raises an issue of recurring National importance. Because the Court of Federal Claims is a court of National jurisdiction, its decisions—and those of the United States Court of Appeals for the Federal Circuit—have National implications. *See Branning*, 7 Cl. Ct. at 783. In the *Delaware Valley* cases and *Blum*, this Court left unresolved the standards to be applied in determining whether enhancement is warranted in exceptional cases. The lower court's decision in this case sets forth a standard nullifying this Court's express authorization of enhancement in exceptional cases under fee-shifting statutes. This case presents the need and opportunity for this Court to provide guidance on the standards to be applied in determining exceptionality.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

02-5180

DON APPLEGATE, GAYLE APPLEGATE, ARLENE MURRAY ATKINSON, ROBERT A. BAUGHER, BIDDERS, INC., (d/b/a Satellite Motel), CANAVERAL SANDS CONDOMINIUM ASSOCIATION, INC., CORAL SEAS CONDOMINIUM ASSOCIATION, INC., JOHN L. DUDA, ELIZABETH A. DUDA, LESLIE D. OHLWILER, VIRGINIA D. EBERWEIN, RICHARD G. HAMMOND, KAREN S. HAMMOND, H.I.P., INC., (d/b/a Coconuts on the Beach), MALCOLM R. KIRSCHENBAUM, JANE KIRSCHENBAUM, GEORGE W. LEWIS, STELLA M. LEWIS, NICHOLAS A. MYERS, CARLITA MYERS, ALLEN H. NEUHARTH, JAMES W. PEEPLES, III, DAVID A. ROBINETTE, MARJORIE ROBINETTE, MILES ROSS, PATRICIA ROSS, SETON BY THE SEA CONDOMINIUM ASSOCIATION, INC., VINCENT E. SPEZZANO, MARGARET SPEZZANO, JIM SWANN, and WAKULLA MOTEL, INC.,

Plaintiff-Appellants,

v.

UNITED STATES,

Defendant-Appellee.

Filed JUL 17 2003

JUDGMENT

ON APPEAL from the United States Court of Federal Claims

In CASE NO(S). 92-CV-832

This CAUSE having been heard and considered, it is

ORDERED and ADJUDGED: AFFIRMED. See Fed. Cir. R. 36

Per Curiam (NEWMAN, LOURIE, and SCHALL, Circuit Judges).

ENTERED BY ORDER OF THE COURT

DATED: JUL 17 2003

/s/
Jan Horbaly, Clerk

APPENDIX B

UNITED STATES COURT OF FEDERAL CLAIMS

No. 92-832 L

APPLEGATE, et al.,
Plaintiffs,

v.

The UNITED STATES,
Defendant.

June 27, 2002

ORDER ON ATTORNEYS FEES

ALLEGRA, Judge.

Blind Plaintiff, lame Defendant,
share the Friendly Laws impartial care,
A Shell for him, A shell for thee,
The Middle is the Lawyer's Fee.[1]

Before the court are the remnants of a hotly-contested taking action stemming from the erosion of Cocoa Beach and other beach holdings south of Cape Canaveral, Florida, allegedly caused by the construction, maintenance and

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[1] Benjamin Franklin, *Poor Richard's Almanack* (1733), in *Papers of Benjamin Franklin* 1:318 (Leonard W. Laaree ed., 1959).

operation of the Port Canaveral jetties. The substantive merits of this case have been resolved via a settlement agreement. That same agreement provides the backdrop for the matter at hand--plaintiffs' entitlement thereunder to a "reasonable" attorneys fee. Perhaps not surprisingly, given the high stakes, the parties' views of what is "reasonable" diverge dramatically and, following extensive briefings and an evidentiary hearing, it falls upon this court to decide how much plaintiffs are owed. For the reasons that follow, the court concludes that plaintiffs shall be awarded attorneys fees in the sum of $1,803,575.

I. Background

To put matters in perspective, a little background is in order.

On December 4, 1992, numerous plaintiffs filed suit in this court seeking compensation for alleged losses due to beach erosion on their properties in Brevard County, Florida, caused allegedly by defendant's construction, operation and maintenance of Canaveral Harbor and, in particular, its jetties. Plaintiffs retained the firm of Gray, Harris, Robinson, Kerschenbaum & Peeples (Gray Harris). Under the retainer agreement, each plaintiff agreed, as follows:

> The court will first determine whether a 'taking' has occurred. You are obligated to us for fees and costs ONLY if a 'taking' is found to have occurred AND a recovery is made. In such circumstances, our fee will be one-third (1/3) of the value of the benefits obtained (40% if an appeal is involved) or the court award of fees, whichever is greater, but not both. In addition, your proportional fair share of the costs will be paid out of your recovery.

The retainer agreement further provided that "[i]f the court finds no taking has occurred we have the right to dismiss and discontinue working the case and you will owe us nothing."

On June 14, 1993, this court (Judge Miller) dismissed plaintiffs' complaint on the ground that it was barred by the applicable statute of limitations. *Applegate v. United States*, 28 Fed.Cl. 554 (1993). On appeal, the Federal Circuit determined that the complaint was not barred because the landowners' claim did not accrue more than six years before its filing. The court of appeals reversed and remanded for further proceedings. *Applegate v. United States*, 25 F.3d 1579 (Fed.Cir.1994). After various forms of procedural wrangling, including one particularly contentious discovery matter,[2] as well as the denial of a motion for summary judgment, the settlement of this action began to take form following the passage of the Water Resources Development Act of 1996, Pub.L. No. 104-303, section 101(b)(7) of which authorized a shore protection project for Brevard County. The Project was to be developed in accordance with certain plans, and subject to certain conditions, recommended in a report authored by the United States Army Corps of Engineers and submitted to the Secretary of the Army on December 23, 1996.

That report defined what came to be known as the "Brevard County Shore Protection Project" (the Project), which it described as including beach fill placement along two shoreline reaches. The most northern of these reaches, bounded by the south jetty of Canaveral Harbor to the north and Patrick Air Force Base to the south, involved properties that are the subject of this lawsuit. This area was to receive beach fill along 9.4 miles of shoreline, requiring approximately 2.5 million cubic yards of beach fill.

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[2] During discovery, a lengthy dispute arose concerning the adequacy of plaintiffs' response to Interrogatory 8 posed by defendant. Ultimately, Judge Miller ordered sanctions against the plaintiffs, ruling that they were ineligible to receive any attorneys and consultants fees in connection with Interrogatory 8. *See Applegate v. United States*, 35 Fed.Cl. 47, 58-59 (1996); *see also* Transcript of Aug. 9, 1996 ("Plaintiffs are on notice that no cost whatsoever associated with complying with Interrogatory 8 will ever be borne by the Government, none whatsoever.").

According to the report, the estimated total construction cost for the north reach plan would be approximately $18,126,000, including $17,892,000 for initial construction and $234,000 for project monitoring. In addition, the report anticipated that additional renourishment would be provided at 6-year intervals over the 50-year life of the Project, with an associated cost of each future nourishment of $4,895,000.

Spurred by the passage of the Water Resources Development Act, and subsequent actions taken by the Corps in furtherance of the Project, the parties, on October 29, 1999, entered into a Settlement Agreement (the Agreement) and Stipulation to Entry of Final Judgment in the above-referenced matter. Pursuant to the Agreement, defendant agreed to pay plaintiffs $5 million, plus interest from October 29, 1999, and to construct the Project, as defined in the Agreement, upon the appropriation of the necessary funds by the Congress. In addition, paragraph II.1.B of the settlement agreement provided:

> For purposes of this Settlement Agreement, Plaintiffs are entitled to recover reasonable attorneys' fees and costs. An award to Plaintiffs for Plaintiffs' attorney fees and costs ... incurred in connection with the Lawsuit as of the date of this Agreement shall be made in an amount to be agreed to by the parties within (30) days subsequent to the date of the appropriation described in paragraph II.1.A. above, or failing agreement, as determined to be reasonable by the United States Court of Federal Claims Judge Lawrence S. Margolis following the submission of documentation of said costs and fees, subject to review by appeal upon petition by either party as provided by law.

Plaintiffs further agreed to endeavor, for three years subsequent to the date of the Agreement, to obtain Congressional appropriations for the Project. Under the Agreement, the full terms of the settlement would become

operative only once appropriation bills were passed that committed not less than 40 percent of the Federal funds estimated to be needed for the initial construction of the Project.[3] Once the Agreement took effect, the Corps agreed to construct the Project within a defined period of time.

In 1999, $5 million was appropriated for the Project. Then, on October 27, 2000, President Clinton signed into law H.R. 4635, which contained an appropriation for an additional $6 million for the Project, bringing the total appropriations to $11 million and thereby triggering the conditions for the Agreement to take effect, including the recovery of attorneys fees. *See* Pub.L. No. 106-377, 114 Stat. 1441 (2000). The actual cost for Phase I of the Project is $23.1 million, of which the Federal share is $14.3 million. Phase I of Project was completed in early 2002. The cost of Phase II of the Project is projected to be $18 million, of which the Federal share is projected to be $11.2 million. The total cost of the Project is now expected to be approximately $42 million, of which the Federal share is projected to be $25.5 million.

As noted above, under the Agreement, Senior Judge Margolis was assigned the responsibility of ascertaining a "reasonable" fee should the parties be unable to agree as to an amount. After no such agreement materialized, on November 13, 2000, Gray Harris filed a motion for fees and costs, seeking $1,990,189.00 in attorneys fees and $190,752.13 in costs, as well as expert fees in the amount of $1,020,405.21. Subsequently, on January 19, 2001, plaintiffs filed an amended motion for fees and costs, which sought a considerably greater amount than their first motion. Following a hearing on this amended motion, on April 12, 2001, plaintiffs filed a motion for evidentiary hearing or, in the alternative, for the court to accept evidence in support of plaintiffs' amended motion for attorneys fees and costs. On

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[3] The Agreement estimated that a total of $21,479,000 would be needed for this purpose, 40 percent of which was $8,591,600.

August 3, 2001, Senior Judge Margolis granted plaintiffs' motion for an evidentiary hearing. However, because he had participated in significant settlement discussions with the parties, Senior Judge Margolis recused himself from further proceedings in this case. This case was subsequently assigned to the undersigned judge, who, on January 29-30, 2002, conducted the aforementioned evidentiary hearing. At that hearing, the court received evidence on, *inter alia*, the accuracy of Gray Harris's billing records and the benefits received by plaintiffs and other property owners as a result of the beach renourishment. Following the filing of post-evidentiary hearing briefs, closing arguments on this matter were heard on March 8, 2002.

II. Discussion

Determining what fees are owed in this case hinges, at least in the first instance, on identifying the proper standard for evaluating what is "reasonable" within the meaning of the Agreement. That topic, therefore, warrants more than a little initial scrutiny.

A. The Legal Standard for Determining What is Reasonable

We begin with first principles. Traditionally, under the so-called "American Rule," litigants generally pay their own way. *See Alyeska Pipeline Serv. Co. v. Wilderness Soc'y*, 421 U.S. 240, 247, 95 S.Ct. 1612, 44 L.Ed.2d 141 (1975). For more than century, however, courts have awarded fees to an attorney who succeeds in creating, protecting or enhancing a common fund from which members of a class are compensated for a common injury inflicted on the class. *See, e.g., Sprague v. Ticonic National Bank*, 307 U.S. 161, 164-67, 59 S.Ct. 777, 83 L.Ed. 1184 (1939); *Trustees v. Greenough*, 105 U.S. 527, 537, 26 L.Ed. 1157 (1881). Under this "common fund" doctrine, typically applied in class actions, the attorneys whose efforts benefitted the fund are entitled to a reasonable fee to be paid from the fund as a

whole. *Boeing Co. v. Van Gemert*, 444 U.S. 472, 478, 100 S.Ct. 745, 62 L.Ed.2d 676 (1980) (citing cases). The underlying rationale for this doctrine, as explained in several early Supreme Court cases, is the equitable notion that the payment of "fair and just allowances for expenses and counsel fees" should be spread among all the beneficiaries of the fund lest some of those individuals be unjustly enriched by the attorney's efforts. *See Central R.R. & Banking Co. of Georgia v. Pettus*, 113 U.S. 116, 126-27, 5 S.Ct. 387, 28 L.Ed. 915 (1885); *Greenough*, 105 U.S. at 532; *see also Boeing*, 444 U.S. at 478, 100 S.Ct. 745; *Third Circuit Task Force, Court Awarded Attorney Fees*, 108 F.R.D. 237, 241 (1986).

The other major exception to the American Rule involves not fee-spreading, but rather fee-shifting, and arises generally under statutes enacted by Congress. The Uniform Relocation Assistance and Real Property Acquisition Policy Act (URA), 42 U.S.C. § 4654(c), constitutes such a proviso. It states that a court rendering a judgment awarding compensation for the taking of property by a Federal agency, or the Attorney General effecting a settlement of any such proceeding, shall determine and award or allow to such plaintiff "such sum as will in the opinion of the court or the Attorney General reimburse such plaintiff for his reasonable costs, disbursements, and expenses, including reasonable attorney ... fees, actually incurred because of such proceeding." While the URA is among a handful of Federal statutes that require awardable fees to have been "actually incurred," *see also, e.g.*, 45 U.S.C. § 726(f)(9) (Regional Rail Reorganization Act), numerous federal fee provisions and rules allow for the recovery of "reasonable" attorney fees that were simply "incurred."[4] And still other fee-shifting statutes

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[4] *See, e.g.*, 5 U.S.C. § 552(a)(4)(E) (Freedom of Information Act); 5 U.S.C. § 552a(g)(2)(B) (Privacy Act of 1974); 28 U.S.C. § 593(f)(1) (Independent Counsel Act); 42 U.S.C.A. § 300aa-15(e) (National Vaccine Compensation Act Program);

authorize the award of "reasonable" attorneys fees without any mention as to what was "incurred" or "actually incurred."[5] *See West Virginia Univ. Hospitals, Inc. v. Casey*, 499 U.S. 83, 89 n. 4, 111 S.Ct. 1138, 113 L.Ed.2d 68 (1991) (cataloguing numerous federal fee-shifting statutes).

As will be seen, cases construing these fee-shifting provisions, as well as those involving the "common fund" doctrine, represent *terra fertilis* from which to harvest the principles for determining what is a "reasonable" fee here. Defendant, however, would take matters further. It argues that the calculation of the fee here is controlled exclusively by the URA, and that only the methods that courts have specifically sanctioned under that statute--those which calculate the fees "actually incurred"--may be employed here. For the following reasons, this court disagrees.

1. The URA is not directly controlling here

Defendant's assertions regarding the URA are misplaced for several reasons:

First, as a matter of simple contract interpretation, there is no indication that the Agreement incorporated the attorney fee provisions in the URA. An agreement to settle a legal dispute is a contract, the interpretation of which is governed by familiar principles. *See, e.g., United States v. ITT Continental Baking Co.*, 420 U.S. 223, 238, 95 S.Ct. 926, 43 L.Ed.2d 148 (1975). The language of the Agreement thus must be given the meaning that would be derived from the contract by a "reasonably intelligent person acquainted with the contemporaneous circumstances." *Hol-Gar Mfg. Corp. v.*

Fed.R.Civ.P. 37(a)(4)(A) (discovery sanctions). *See also Raney v. Federal Bureau of Prisons*, 222 F.3d 927, 934 (Fed.Cir.2000) (en banc).

[5] *See, e.g.*, 42 U.S.C. § 1988(b) (Civil Rights Act Attorney's Fees Awards Act of 1976); 29 U.S.C. § 1132(g) (Employee Retirement Income Security Act of 1974).

United States, 169 Ct.Cl. 384, 351 F.2d 972, 975 (1965). Here, the Agreement makes no mention of the URA, even though it incorporates by reference several other Federal statutes, for example, citing the Declaration of Taking Act to control certain interest calculations. Nor do any of its provisions, some of which provide significant details regarding the process for calculating the fee, even track the language of the URA--unlike that statute, for example, the Agreement does not indicate that the "reasonable" attorneys fees owed had to be "actually incurred." Thus, there is nothing within the four corners of the Agreement that supports defendant's position.

Indeed, while parole evidence is of dubious value on this issue, owing to the lack of any ambiguity in the Agreement, it remains that there is not a shred of evidence that suggests either that the parties intended that the determination of a "reasonable" attorneys fee would be controlled by the URA, or even that defendant somehow unilaterally expressed or reserved this point. The court is left then with the possibility that defendant had an unexpressed intention to invoke the URA, but as stated by the Federal Circuit, the " 'subjective unexpressed intent of one of the parties' to a contract is irrelevant." *Andersen Consulting v. United States*, 959 F.2d 929, 934 (Fed.Cir.1992) (quoting ITT *Arctic Servs., Inc. v. United States*, 207 Ct.Cl. 743, 524 F.2d 680, 684 (1975)).[6]

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[6] *See also Firestone Tire & Rubber Co. v. United States*, 195 Ct.Cl. 21, 444 F.2d 547, 551 (1971), *later proceeding*, *Firestone Tire & Rubber Co. v. United States*, 196 Ct.Cl. 807 (1971); *PCL Const. Services, Inc. v. United States*, 47 Fed.Cl. 745, 785 (2000). Defendant also seems to suggest that because it subjectively believed that the URA was controlling, while plaintiffs did not, there was no meeting of the minds as to this portion of the Agreement. This sort of contention is far too convenient, for it effectively would allow one contracting party to renege on a contract at will based on unexpressed intentions. Such is decidedly not the law, particularly where, as here, there is no ambiguity in the contract itself. *See also Restatement (Second) of Contracts* § 2 cmt. b (1981).

Thus, as a plain vanilla matter of contract interpretation, this court sees utterly no basis upon which to graft upon the Agreement the supposedly limiting language of the URA.

Second, the URA does not control here as a matter of law. Seeking a backdoor means of enforcing its interpretation of the Agreement, defendant quixotically asserts that the award of attorneys fees must be limited by the URA, because, absent that statute, the Attorney General's representative would have lacked the authority to agree to pay a "reasonable" attorneys fee--their agreement, defendant contends, would both have been *ultra vires* and violated the doctrine of sovereign immunity. *Per contra*. The Attorney General's authority to agree to pay attorneys derives from sections 516 and 519 of Title 28, which provide, respectively, that the conduct of litigation in which the United States is a party is "reserved to officers of the Department of Justice, under the direction of the Attorney General" and that the Attorney General shall supervise all such litigation. 28 U.S.C. §§ 516, 519 (2002).

This conclusion finds solid support in a 1982 opinion of the Justice Department's Office of Legal Counsel. This opinion was authored by then Assistant Attorney General (now Solicitor General) Theodore B. Olson, who limned the law on the Attorney General's settlement powers thusly:

> Executive Order 6166, together with Section 516 and 519 of Title 28 of the U.S. Code (and their predecessor provisions), have been interpreted consistently by the courts to vest the Attorney General with virtually absolute discretion to determine whether to compromise or abandon claims made in litigation on behalf of the United States. *See New York v. New Jersey*, 256 U.S. 296, 308, 41 S.Ct. 492, 65 L.Ed. 937 (1921); ... In deciding to settle or abandon a claim, or not to prosecute at all, the Attorney General is not restricted to considerations only of litigative probabilities, but rather

> may make a decision, in his discretion on the basis of national policies espoused by the Executive.... The only limitations placed on the Attorney General's settlement authority are those which pertain to his litigating authority generally--i.e., explicit statements by Congress circumscribing his settlement authority, ... and the duty imposed on the President by Article II, § 3 of the Constitution to "take Care that the Laws be faithfully executed...."

OLC, "The Attorney General's Role as Chief Litigator for the United States," 6 U.S. Op. OLC 47, 59-60 (1982).[7] A veritable legion of decisions, both pre- and post-dating the opinion, confirm that the Attorney General may agree to

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[7] As further indication of the Attorney General's authority, this OLC opinion also referred to Executive Order No. 6166, June 10, 1933, reprinted in 5 U.S.C. § 901. Section 5 of this order provides in part:

> As to any case referred to the Department of Justice for prosecution or defense in the courts, the function of decision whether and in what manner to prosecute, or to defend, or to compromise, or to appeal, or to abandon prosecution or defense, now exercised by any agency or officer, is transferred to the Department of Justice.

See Sagebrush Rebellion, Inc. v. Watt, 713 F.2d 525, 529 (9th Cir.1983); *United States v. Newport News Shipbuilding & Dry Dock Co.*, 571 F.2d 1283, 1287 (4th Cir.1978), *cert. denied*, 439 U.S. 875, 99 S.Ct. 212, 58 L.Ed.2d 189 (1978). The opinion also drew upon, *inter alia*, two prior opinions in which the Justice Department had concluded that the Attorney General has the plenary power to settle or compromise any case on such terms as he sees fit, except where a given settlement would result in action plainly in conflict with Congressional intent. *See* OLC, "Settlement Authority of the United States in Oil Shale Cases," 413 U.S. Op. OLC 756, 757-58 (1980) (stating settlement authority is plenary except to the extent "where the settlement would result in action plainly at variance with Congress' intent"); 38 Op. Att'y Gen. 98, 99 (1934). *See Burton v. Administrator, General Services Administration*, 1992 WL 300970 (D.D.C.1992).

settlement terms inconsistent with, or at least different from, what would have resulted had a case been fully litigated. For example, in words condign here, the Supreme Court long ago stated, in rejecting an attack on the Government's authority to settle an antitrust case on terms allegedly inconsistent with the Sherman Act, that "we do not find in the statutes defining the powers and duties of the Attorney General any such limitation on the exercise of his discretion as this contention involves. His authority to make determinations includes the power to make erroneous decisions as well as correct ones." *Swift & Co. v. United States*, 276 U.S. 311, 331-32, 48 S.Ct. 311, 72 L.Ed. 587 (1928); *see also New York v. New Jersey*, 256 U.S. at 308, 41 S.Ct. 492; *Confiscation Cases*, 74 U.S. (7 Wall.) 454, 458- 59, 19 L.Ed. 196 (1868).[8]

The only exception to the Attorney General's otherwise plenary settlement authority arises where there is some "clear and unambiguous directive from Congress" that limits that authority. *See Hercules*, 961 F.2d at 798; *see also Executive Business Media, Inc. v. U.S. Dept. of Defense*, 3 F.3d 759, 762 (4th Cir.1993). However, neither the URA nor any other statute constitutes such a "clear and unambiguous" limitation. Certainly, section 4654(c) does not. It obliges the Attorney General to pay fees in certain circumstances, but does not preclude him from agreeing to pay fees in other circumstances or in amounts theoretically in excess of those authorized by the URA. In settlements, then, the URA's fee-shifting provision comprises not a ceiling, but rather a floor, and in no way cabins the Attorney General's normal settlement authority under sections 516 and 519, as well as

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[8] For more recent cases on this point, *see United States v. Hercules, Inc.*, 961 F.2d 796, 798-99 (8th Cir.1992) (citing additional cases and noting that the Attorney General's plenary authority "includes the power to enter into consent decrees and settlements"); *Newport News* at 1287 (describing the Department of Justice's authority to settle cases); *Hoskins Lumber Co., Inc. v. United States*, 24 Cl.Ct. 259, 265 (1991).

Executive Order 6166.[9] As such, in the absence of some contractual indication that the Attorney General's designate was acting under or invoking the URA--of which, there is none--this court readily concludes that the Agreement simply requires it to determine a "reasonable" fee independent of any alleged limitations associated with the URA.

Nor does this conclusion clash with the doctrine of sovereign immunity. Sailing headlong into the teeth of the authorities described above, defendant argues that, apart from the URA, there is no waiver of sovereign immunity here to allow for the payment of attorneys fees. In support of this claim, it relies upon *Presidential Gardens Associates v. United States*, 175 F.3d 132 (2d Cir.1999), in which the Second Circuit held that a settlement agreement could not waive the immunity of the United States from suit. The court reasoned that "[t]he sovereign immunity of the United States may only be waived by federal statute," and quoted from the Supreme Court's seminal decision in *Mitchell*, to the effect that "no contracting officer or other official is

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[9] A contrary view--that the Attorney General could agree to pay attorneys fees only where a statute specifically authorized him to do so--would have serious ramifications for both the Attorney General and, derivatively, the civil justice system. Such a ruling would prevent the Attorney General from settling most cases in which the payment of attorneys fees is a deciding factor. Unlike the URA, most fee-shifting statutes, prominently among them the Equal Access to Justice Act and the Civil Rights Attorney's Fees Awards Act, provide no authorization for the Attorney General to agree to pay attorneys fees. Thus, under defendant's view of the law, the Attorney General would be unable to agree to pay attorneys fees in settlements of cases covered by those statutes. Such a construction of the law, if adopted, would essentially force plaintiffs to litigate matters to completion in order to recover fees, creating unnecessary litigation, and thereby running contrary to the public policy in favor of settling and quieting litigation. *See Ahern v. Central Pacific Freight Lines*, 846 F.2d 47, 48 (9th Cir.1988); *United States v. McInnes*, 556 F.2d 436, 441 (9th Cir.1977). Fortunately, defendant's cramped view of the law is manifestly erroneous.

empowered to consent to suit against the United States." 175 F.3d at 140 (quoting *United States v. Mitchell*, 463 U.S. 206, 215-16, 103 S.Ct. 2961, 77 L.Ed.2d 580 (1983)). The government, however, stretches *Presidential Gardens* well beyond its facts and holding. The Second Circuit did not consider whether the Attorney General could agree to pay attorneys fees or other amounts not specifically authorized by a statute, but merely held that a settlement agreement could not independently confer jurisdiction on the district court to enforce such a settlement. Notably, that court observed that the settlement agreement likely could be enforced in this court under the Tucker Act. *Id.* at 141.

In relying on this decision, defendant seemingly addles the concept of sovereign immunity--that the "United States cannot be sued at all without the consent of Congress," *Block v. North Dakota ex rel. Bd. of Univ. and School Lands*, 461 U.S. 273, 287, 103 S.Ct. 1811, 75 L.Ed.2d 840 (1983)--with that of settlement authority--that a duly-authorized individual must commit the government to the expenditure of funds. Here, the requisite waiver of sovereign immunity derives not from the Attorney General's statutory authority to compromise this case, but rather from this court's undoubted authority to enforce the Agreement under the Tucker Act. *See McDonald's Corp. v. United States*, 926 F.2d 1126, 1129 (Fed.Cir.1991); *Village of Kaktovik v. Watt*, 689 F.2d 222, 231 n. 76 (D.C.Cir.1982). Moreover, even were some explicit waiver required to oblige the government to pay attorneys fees, the case law suggests that where authority to settle a claim lies, a contract, at least in this court, can effectuate such a "waiver." The Supreme Court signaled as much in *Shaw*, when it stated that immunity for interest may be waived by "statute or *by contract.*" *Library of Congress v. Shaw*, 478 U.S. 310, 317, 106 S.Ct. 2957, 92 L.Ed.2d 250 (1986) (emphasis added). If "immunity" for interest may be waived by contract, the same must hold true for attorneys fees. Such, indeed, is effectively the holding in several

decisions concluding that the government may not invoke sovereign immunity in seeking to avoid the terms of a duly-authorized settlement agreement.[10]

Finally, even if defendant were correct that the URA controls here, there is no indication that the application of that statute would constitute any real limitation on the fee recoverable here. Thus, while defendant's attaches talismanic significance to the statutory requirement that fees be "actually incurred," the courts have not accorded that language much precision. In most factual settings, they have applied similar methodologies in setting fees whether a particular statute or agreement allowed for the award of "reasonable attorney fees," "reasonable attorney fees incurred" or, as in the URA, "reasonable attorney fees actually incurred." *See, e.g., Raney, 222* F.3d at 932-34; *Osprey Pacific Corp. v. United States*, 42 Fed.Cl. 740, 742-43 (1999); *Shelden v. United States*, 41 Fed.Cl. 347, 349-351 (1998).[11] By way of further example, this court, in a well-reasoned opinion by Judge Miller, recently rejected the notion that the use of the word "actually" distinguishes the URA from other fee-shifting statutes that employ only the word "incurred," observing:

> The addition of the word "actually," defined by the Oxford English Dictionary as "[i]n act or fact; as opposed to possibly, potentially, theoretically, ideally,"

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[10] *See, e.g., United States v. Bankers Ins.* Co., 245 F.3d 315, 320 (4th Cir.2001) (holding sovereign immunity waived in agreement submitting matter to arbitration, stating "[p]ut simply, the doctrine of sovereign immunity is not in any way implicated or threatened by the Government's compliance with its contract obligations."); *United States v. McInnes*, 556 F.2d 436, 441 (9th Cir.1977) (sovereign immunity waived in settlement agreement).

[11] This overlap is understandable, as the Supreme Court has frequently indicated that its rulings regarding one fee-shifting statute are generally applicable to others. *See, e.g., City of Burlington v. Dague*, 505 U.S. 557, 562, 112 S.Ct. 2638, 120 L.Ed.2d 449 (1992); *Hensley*, 461 U.S. at 430 n. 4, 103 S.Ct. 1933.

> appears to do little to qualify this meaning.... Colloquially, at least, one is either liable or one is not--no difference distinguishes one who has become liable. Conversely, an obligation that is not "actually incurred" simple is not "incurred."

Preseault v. United States, 52 Fed.Cl. 667, 674-75 (Ct.Cl.2002) (citations omitted); *see also SEC v. Comserv Corp.*, 908 F.2d 1407, 1414 n. 9 (8th Cir.1990) (finding no apparent difference between phrase "actually incurred" in the URA and the word "incurred" in the EAJA). To cinch matters, even if the law were otherwise, defendant wholly fails to explain how, in a case in which plaintiffs' agreement to a 40-percent contingency fee essentially represents the maximum amount of attorneys fees "actually incurred," the application of the supposed limitations in the URA has any real bite.

So, if the URA is not directly controlling here, what is? To that important matter, the court now turns.

2. Mapping the Contours of the Reasonableness Inquiry: The Common Fund/Statutory Fee-Shifting Distinction

In arguing what is "reasonable" here, plaintiffs contend their attorneys are entitled to a multiple of the "lodestar" calculation or, alternatively, to some percentage of the entire benefit they received (including the governmental appropriations for the renourishment of their beaches). Defendant, for its part, however, asservates not only that plaintiffs should be limited strictly to the lodestar calculation, but also that the hours listed by Gray Harris should be reduced for unreasonable, excessive and inadequately-documented billings. These very different approaches yield widely disparate results--while plaintiffs seek as much as $12.3 million, defendant contends that only approximately $1.8 million (or less) is owed.

To resolve this debate, this court initially must decide whether--and to what extent--this case is more appropriately analogized to a statutory fee case, as opposed to a common fund case.[12] This distinction is important because different considerations and factors inform the fee determination in these two kinds of cases. Thus, in fee-shifting cases, the courts have employed a relatively strict version of the lodestar calculation, with most courts following the Supreme Court's generalship in severely restricting the circumstances warranting the application of some multiple to the lodestar. Quite different principles, however, have been applied in common fund cases, in which courts readily calculate fees either as a percentage of the fund recovered or, depending on the circuit, a multiple of the lodestar. *See, e.g., Goldberger v. Integrated Resources, Inc.*, 209 F.3d 43, 47 (2d Cir.2000).

a. Distinguishing Between Fee-Shifting and Fee-Spreading

Which is more applicable here--the fee shifting principles or the fee- spreading rules applicable to common funds? In many cases, of course, this is an easy choice effectively made when a prevailing plaintiff petitions for fees under a given fee-shifting statute, thereby invoking the principles associated with that statute. In other cases, however, courts have grappled with the precise question presented here in deciding how to calculate attorneys fees in the case of a settlement, particularly settlements in matters that, if fully litigated, would have raised the specter of a fee award under a fee-shifting statute. *See* Martha Pacold, "Attorney's Fees in Class Actions Governed by Fee-Shifting Statutes," 68 U.Chi. L.Rev. 1007, 1026 (2001). A review of these cases suggests

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[12] Almost 80 years ago, Dean Roscoe Pound wrote in his book *The Interpretations of Legal History* that "all interpretations go on analogies. We seek to understand one thing by comparing it with another. We construct a theory of process by comparing it with another." Roscoe Pound, *Interpretations of Legal History* 151 (1923).

three key and somewhat interrelated factors have been relied upon in deciding whether an award should be governed by fee-shifting or fee- spreading principles.

The first, quite simply, is whether a common fund exists--whether plaintiff has created, discovered, increased or preserved a fund to which others also have a claim. *See Alyeska Pipeline Service Co.*, 421 U.S. at 257-58, 95 S.Ct. 1612; *see also Chambers v. NASCO, Inc.*, 501 U.S. 32, 45, 111 S.Ct. 2123, 115 L.Ed.2d 27 (1991) (noting that the common fund exception "allows a court to award attorney's fees to a party whose litigation efforts directly benefit others"). If no such fund exists, the common fund approach lacks its anchor and is foreclosed. *See Swedish Hospital Corp. v. Shalala*, 1 F.3d 1261, 1268 (D.C.Cir.1993); *Edelman v. PSI Associates II, Inc.*, 147 F.R.D. 217, 220 (C.D.Cal.1993).[13] A second focus is on who pays the attorneys fees. In fee-shifting cases, the defendant bears the burden of compensating the plaintiff's counsel, while in common fund cases, the defendant pays a lump sum to extinguish any claim against it both for damages and attorneys fees. *See In re Washington Public Power Supply Sys. Sec. Litigation*, 19 F.3d 1291, 1299-1300 (9th Cir.1994). Accordingly, "[t]he common fund theory does not

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[13] Early Supreme Court cases seemingly required that the fund be "brought under the direct control of the court." *See, e.g., Pettus*, 113 U.S. at 124, 5 S.Ct. 387. In recent years, the Court has loosened this requirement, indicating that the court must have "[j]urisdiction over the fund involved in the litigation." *Boeing*, 444 U.S. at 478, 100 S.Ct. 745; *see also Bloomer v. Liberty Mutual Ins. Co.*, 445 U.S. 74, 77, 100 S.Ct. 925, 63 L.Ed.2d 215 (1980). For the reasons that follow, the court need not resolve whether this requirement was met in the instant case. *Compare National Treasury Employees Union v. Nixon*, 521 F.2d 317, 321 (D.C.Cir.1975) (finding that Congressional appropriation for retroactive pay increases to 3.5 million Federal employees resulted in creation of common fund) *with Holbrook v. Pitt*, 748 F.2d 1168, 1174-75 (7th Cir.1984) (finding no common fund where moneys appropriated for HUD were to be used to pay retroactive rent subsidies under settlement).

impose additional liability on the losing defendant," *Knight v. United States*, 982 F.2d 1573, 1579 (Fed.Cir.1993), and, as such, "there is no direct or immediate danger of unduly burdening the defendant," *Skelton v. General Motors Corp.*, 860 F.2d 250, 254 (7th Cir.1988), *cert. denied*, 493 U.S. 810, 110 S.Ct. 53, 107 L.Ed.2d 22 (1989). *See also Florin v. Nationsbank of Georgia*, 34 F.3d 560, 563 (7th Cir.1994). Finally, the rationale underlying the awards in these two types of cases is fundamentally different. In the typical fee-shifting case, the award is designed to encourage private enforcement of substantive rights, by allowing plaintiffs to obtain counsel and not have their awards diminished by the expense of vindicating their rights. By contrast, common fund claims, like suits for contribution, effectuate a simple equitable notion--that those who have benefitted from the litigation should share in its costs. *Knight*, 982 F.2d at 1580.

Consistent with the taxonomic paradigm outlined above,[14] this court concludes that this case is most analogous to a fee-shifting matter. First, the Agreement did not create an identifiable "common fund," but merely provided for the payment of damages in two forms--cash from the Treasury and benefits to be received in kind as the result of future Congressional appropriations. Neither form of compensation was distributed to individuals not parties to this litigation--the $5.5 million in cash and interest was distributed only to the named plaintiffs, while the Congressional appropriation was not distributed to anyone, but rather was used directly to renourish the beach, thereby conferring benefits on not only plaintiffs and the adjoining landowners, but the general public, as well. *Compare Knight*, 982 F.2d at 1581;

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[14] Similar requirements for the application of the common fund doctrine are discussed at 10 *Moore's Federal Practice* § 54.171[2][a] (Mathew Bender 3d ed.2002).

Holbrook, 748 F.2d at 1175-76.[15] Second, under the Agreement, it is not plaintiffs, but rather defendant, who is paying the attorney fees. Truly the sockdolager here, this feature is the heart of what sets this case apart from the typical common fund case, raising the specter here, not found in common fund cases, that an improper fee award would unduly burden defendant. *Compare Edelman*, 147 F.R.D. at 220. Finally, in focusing on the underlying rationale for the award here, it is notable that neither the mechanics of the fee award itself, nor the Agreement from which it springs, would require all those who have benefitted from the settlement to share any costs. To the contrary, those individuals whose beaches were repaired, but who were not parties to this litigation, incurred no financial obligation under the Agreement or otherwise; their recovery is undiminished. Thus, the rationale ordinarily underlying a common fund case is missing here--any unjust enrichment occasioned by the renourishment of the beaches is not remedied by the Agreement.

Accordingly, in the circumstances of this case, all roads lead to Rome--the principles applicable in fee-shifting

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[15] Indeed, these adjoining landowners are only incidental beneficiaries of this litigation, who, under traditional common fund jurisprudence, would be under no obligation to share the legal expenses. As testimony in this case verifies, these landowners received benefits only because there was no way to effectuate a beach renourishment without repairing the entire beach. Plaintiffs thus sought the renourishment not to benefit their neighbors, but rather as the sole means of renovating their own properties. In similar circumstances, the case law establishes that the common fund doctrine is inapplicable. *See, e.g., Morganroth & Morganroth v. DeLorean*, 213 F.3d 1301, 1318-19 (10th Cir.2000); *Capital Bancshares, Inc. v. United States*, 957 F.2d 203, 208-09 (5th Cir.1992); *see also* 1 *Derner and Wolf. Court Awarded Attorneys Fees* ¶ 2.05[2] (2001); 10 *Moore's Federal Practice* § 54.171[2][a][iii] (Mathew Bender 3d ed.2002).

cases are most directly analogous in determining what is a "reasonable" fee here and shall be applied by this court.[16]

b. The Fee-Shifting Principles Applicable Here

Having found that this case should be guided by statutory-fee shifting principles, the next task is to describe those *regulae*. In the context of statutory fee-shifting cases, the Supreme Court has consistently recognized that a "reasonable" fee is to be a "fully compensatory fee," *Hensley v. Eckerhart*, 461 U.S. 424, 435, 103 S.Ct. 1933, 76 L.Ed.2d 40 (1983), and is to be "calculated on the basis of rates and practices prevailing in the relevant market." *Missouri v. Jenkins*, 491 U.S. 274, 286, 109 S.Ct. 2463, 105 L.Ed.2d 229 (1989); *see also Raney*, 222 F.3d at 932; *Rupert v. Secretary of the Department of Health and Human Services*, 52 Fed.Cl. 684 (2002). Fleshing these principles out, the Supreme Court, in construing a wide variety of fee-shifting statutes, has enthusiastically endorsed use of the lodestar figure--the product of billed hours times an hourly rate--as the starting point for determining the amount of a reasonable fee. Hence, in *Hensley*, 461 U.S. at 433, 103 S.Ct. 1933, the Court said that "[t]he most useful starting point for determining the amount of a reasonable fee is the number of hours reasonably expended on the litigation multiplied by a reasonable hourly rate," indicating further that "[t]his calculation provides an

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[16] While other possible bases support this conclusion, *e.g.*, the fact that the Agreement also benefits the public at large and thus does not benefit a group of beneficiaries that is "small in number and easily identifiable," *Boeing*, 444 U.S. at 478-79, 100 S.Ct. 745, the court does *not* rely on the fact that this case would have been controlled by a fee-shifting statute had plaintiffs litigated this matter to completion and prevailed. Rather, the focus here is on the terms of the Agreement, as executed, and this court does not decide whether a differently-constructed settlement might be governed by common fund principles.

objective basis on which to make an initial estimate of the value of a lawyer's services."[17]

That said, the Court in *Hensley* also stated that the lodestar "does not end the inquiry," *Hensley*, 461 U.S. at 434, 103 S.Ct. 1933, noting that, on suitable occasions, "there remain other considerations that may lead the ... court to adjust the fee upward or downward." *Id.* Indeed, prior to the 1990s, courts readily considered various factors in deciding whether to enhance or reduce the lodestar. In one of the most commonly relied upon formulations, the Fifth Circuit, in *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714, 717-19 (5th Cir.1974), adopted the elements set forth in the ABA Model Code of Professional Responsibility DR2-106(B) as guidelines for determining the size of an appropriate attorneys fee, including "time and labor required," "the amount involved and the results obtained," and whether the fee actually contracted by the plaintiff was fixed or contingent. 488 F.2d at 718. Others factors cited by that court included the novelty and difficulty of the questions presented, the skill requisite to respond to those issues, the experience, reputation and ability of the attorneys, as well as the "undesirability" of the case. 488 F.2d at 718-719; *see also Hensley*, 461 U.S. at 434 n. 9, 103 S.Ct. 1933. These factors were cited in the legislative history accompanying the passage of the Civil Rights Attorney's Fees Act and, for a time, were commonly employed in cases involving fee disputes under that statute. *See Hensley*, 461 U.S. at 429-430, 103 S.Ct. 1933; *see also Blanchard*, 489 U.S. at 91, 109 S.Ct. 939. At various

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[17] *See also City of Burlington v. Dague*, 505 U.S. at 562, 112 S.Ct. 2638 ("The 'lodestar' figure has, as its name suggests, become the guiding light of our fee-shifting jurisprudence."); *Blanchard v. Bergeron*, 489 U.S. 87, 94, 109 S.Ct. 939, 103 L.Ed.2d 67 (1989) ("[W]e have said repeatedly that '[t]he initial estimate of a reasonable attorney's fee is properly calculated by multiplying the number of hours reasonably expended on the litigation times a reasonable hourly rate.' " (quoting *Blum*, 465 U.S. at 888, 104 S.Ct. 1541)).

points and in varying degrees, they also have been applied to set fees in other contexts, including several situations involving settlement agreements.[18]

But, over the last fifteen to twenty years, the Supreme Court has steadily whittled down the *Johnson* factors, depriving them of much of their vitality in fee-shifting cases. The Court foreshadowed this approach in *Hensley*, cautioning that reliance on many of the *Johnson* factors would lead to "double-counting" because "many of these factors usually are subsumed within the initial calculation of hours reasonably expended at a reasonable hourly rate." *Hensley*, 461 U.S. at 434 n. 9, 103 S.Ct. 1933. In *Blum v. Stenson*, 465 U.S. 886, 104 S.Ct. 1541, 79 L.Ed.2d 891 (1984), the Court made explicit what it had previously implied, specifically holding that the novelty or complexity of the issues presented, and generally the quality of representation, do not provide a basis for enhancing the lodestar. 465 U.S. at 899, 104 S.Ct. 1541; *see also Pennsylvania v. Delaware Valley Citizens' Council for Clean Air*, 478 U.S. 546, 566, 106 S.Ct. 3088, 92 L.Ed.2d 439 (1986), ("[O]verall quality of performance ordinarily should not be used to adjust the lodestar."); *Kelly v. City of Oakland*, 198 F.3d 779, 786 (9th Cir.1999). Likewise, the *Blum* court stated that the "results obtained" ordinarily is subsumed within the lodestar amount and should not be an independent basis for increasing the fee amount. 465 U.S. at 900, 104 S.Ct. 1541; *see also Fischer v. SJB-P.D. Inc.*, 214

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[18] *See, e.g., Wing v. Asarco, Inc.*, 114 F.3d 986, 988-89 (9th Cir.1997) (settlement agreement to pay "reasonable attorney's fees"); *Western Shoshone Identifiable Group v. United States*, 228 Ct.Cl. 26, 652 F.2d 41, 47 (1981) (citing *Cherokee Nation* v. *United States*, 174 Ct.Cl. 131, 355 F.2d 945, 953-54 (1966); *White Mountain Apache Tribe of Arizona v. United States*, 30 Fed.Cl. 8, 13 (1993)) (litigation under the Indian Claims Commission Act), *aff'd*, 31 F.3d 1176 (Fed.Cir.1994), *cert. denied*, 513 U.S. 929, 115 S.Ct. 319, 130 L.Ed.2d 280 (1994).

F.3d 1115, 1119 (9th Cir.2000); *Rupert*, 52 Fed.Cl. 684; *Persyn v. United States*, 36 Fed.Cl. 708, 715 (1996).

More recently, in *Dague*, *supra*, the Supreme Court unequivocally held that, when granting attorneys fees under the fee-shifting provisions of the Solid Waste Disposal Act and the Clean Water Act, courts may not enhance the lodestar amount to reflect risk of loss or contingency. The Court began its analysis by reaffirming its "strong presumption" that the lodestar represents the "reasonable fee" promised in most fee-shifting provisions, observing that the fee applicant who seeks enhancement "has the burden of showing that 'such an adjustment is *necessary* to the determination of a reasonable fee.' " 505 U.S. at 562, 112 S.Ct. 2638 (quoting *Blum*, 465 U.S. at 898, 104 S.Ct. 1541). It then held that enhancement for contingency "would likely duplicate in substantial part factors already subsumed in the lodestar." *Id.* Risk of loss, the Court reasoned, is the product of two factors: the legal and factual merits of the claims, and the difficulty of establishing those claims. *Id.* at 562, 112 S.Ct. 2638. It found that the second factor is ordinarily reflected in the lodestar itself through the number of hours spent on the case, or in the higher hourly rate of an attorney especially skilled in the area of law. The first fact, the Court opined, should also not be reflected in an enhancement, because if it were, attorneys would have "the same incentive to bring relatively meritless claims as relatively meritorious ones." *Id.* at 563, 112 S.Ct. 2638. In the court's view, such a result would penalize parties with the strongest defenses--under risk analysis, such defendants, if they lost, would be exposed to higher multiples. *Id.* at 563, 112 S.Ct. 2638.[19] The Court thereby concluded that statutory fees should not be

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[19] *See also Delaware Valley*, 478 U.S. at 557, 106 S.Ct. 3088; *Washington Public Power*, 19 F.3d at 1301 n. 10 ("The stronger the defense, the higher the risk involved in bringing the suit and the greater the multiplier necessary to compensate plaintiff's attorney for bringing the action.").

enhanced for risk. *See also Venegas v. Mitchell*, 495 U.S. 82, 87, 110 S.Ct. 1679, 109 L.Ed.2d 74 (1990).[20]

While some courts have observed that "the lodestar method is a tool, not a straight jacket," *Coutin v. Young & Rubicam Puerto Rico, Inc.*, 124 F.3d 331, 337 (1st Cir.1997), in reality, the Supreme Court has left "very little room" to maneuver for those seeking an enhancement of the basic lodestar fee. *Stewart v. Gates*, 987 F.2d 1450, 1453 (9th Cir.1993); *see also Walker v. U.S. Dept. of Housing and Urban Development*, 99 F.3d 761, 771-72 (5th Cir.1996); *Rupert*, 52 Fed.Cl. 684. That is because, as explained above, the lodestar figure encompasses most, and arguably all, of the relevant factors historically regarded as marking a "reasonable" attorneys fee. Nevertheless, the Supreme Court potentially has left a little wiggle room, implying, albeit in *dicta*, that considerations such as "the important factor of the results obtained" might lead a court permissibly to adjust a fee upward. *Blum*, 465 U.S. at 897 & n. 14, 104 S.Ct. 1541. Indeed, several courts have gone so far as to suggest that

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[20] *Dague* has since been extended by other courts to apply to various federal fee-shifting statutes and agreements. *See, e.g., Van Gerwen v. Guarantee Mut. Life Co.*, 214 F.3d 1041, 1048 (9th Cir.2000); *Rutherford v. Harris County, Texas*, 197 F.3d 173, 193 (5th Cir.1999). By contrast, a majority of the circuits have ruled that *Dague* does not apply in common fund cases. *See, e.g., Florin*, 34 F.3d at 564; *Washington Public Power*, 19 F.3d at 1299. To be sure, the risk of loss here is somewhat different than that encountered under a typical contingent fee arrangement. Indeed, unlike the typical settlement agreement, the Agreement here introduced an additional level of risk into this matter as plaintiffs, and derivatively their attorneys, were to obtain the judgment and other benefits identified in the Agreement only if the Congress appropriated at least $8,591,600 for the Project. That there was more risk here than usual, however, does not fundamentally alter the analysis employed by the Supreme Court in determining whether an enhancement may be based on the assumption of risk. Accordingly, in the court's view, the type of contingent risk encountered here does not set this case apart from *Dague*.

"exceptional results" is the only permissible factor to be considered in adjusting the lodestar figure.[21] Other cases hold forth the prospect that a second factor--the "undesirability" of a case--has survived the Supreme Court's parsimony regarding enhancements and might yet impact on the reasonableness of a fee award. The applicability of these remaining factors is best considered in reviewing the lodestar calculation itself, to which the court now proceeds.

B. The Anatomy of the Award

In calculating the award here, three sets of issues remain: those arising from the basic lodestar calculation; those involving an enhancement of the lodestar for delay; and those offering the possibility that some multiple of the lodestar may be awarded. The court will deal with these sets of issues *seriatim*.

1. The Basic Lodestar Calculation

The lodestar approach contemplates judicial ascertainment of "the number of hours reasonably expended on the litigation multiplied by a reasonable hourly rate." *Hensley*, 461 U.S. at 433, 103 S.Ct. 1933; *see also View Engineering, Inc. v. Robotic Vision Systems, Inc.*, 208 F.3d 981, 987 n. 7 (Fed.Cir.2000). In implementing this lodestar approach, this court calculates the time counsel spent on the case, subtracts duplicative, unproductive, or excessive hours, and then applies prevailing rates in the community (taking into account the qualifications, experience, and specialized competence of the attorneys involved). *See Pennsylvania Envt'l Defense*, 152 F.3d at 231-32; *LeBlanc-Sternberg v. Fletcher*, 143 F.3d 748, 764 (2d Cir.1998). In this process, the attorneys' contemporaneous billing records constitute the usual starting point, but the court's discretion is by no means

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[21] *See, e.g., Spegon v. Catholic Bishop of Chicago*, 175 F.3d 544, 557 (7th Cir.1999); *Pennsylvania Env'tl Defense Found. v. Canon-McMillan Sch. Dist.*, 152 F.3d 228, 232 (3d Cir.1998).

shackled by those records. For example, "it is the court's prerogative (indeed, its duty) to winnow out excessive hours, time spent tilting at windmills, and the like." *Gay Officers Action League v. Puerto Rico*, 247 F.3d 288, 296 (1st Cir.2001); *see also Hensley*, 461 U.S. at 434, 103 S.Ct. 1933.

According to the billing records provided to the court, Gray Harris has expended 13,048.25 hours in this case, which, at their historic rates (the reasonableness of which is uncontested), yields a lodestar of $1,994,277.[22] Defendant urges this court to reduce this figure for several reasons.

Initially, it argues that the time Gray Harris billed with respect to Interrogatory 8 should not be included in the lodestar. Recall that prior to the settlement of this case, Interrogatory 8 was the subject of a protracted and acrimonious discovery dispute, with plaintiffs providing various responses to that interrogatory that were deemed nonresponsive. From the time this interrogatory was served on January 11, 1995, until the time that plaintiffs produced a satisfactory response almost two years later, Judge Miller ordered plaintiffs to comply with the discovery request on five separate occasions, held four status conferences to discuss compliance, and twice specifically granted defendant's motion to compel answers to the interrogatory. *See Applegate v. United States*, 35 Fed.Cl. 47, 55 (1996). Eventually, the court determined that plaintiffs' non-compliance with its orders was willful, and, on August 9,

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[22] From the beginning of this matter until October 28, 1999, the date of the settlement, these records indicate that plaintiffs had incurred $1,949,196.50 in attorneys fees at their attorneys' historic rates, with additional fees expended from October 29, 1999, to January 11, 2001, again at historic rates, of $45,080.50. Thus, the lodestar calculation here preliminarily yields a total of $1,994,277 in attorneys fees. These records also reveal considerable expert fees and costs. Defendant initially contested these fees and costs, as well, but on the eve of the evidentiary hearing, this matter was resolved by the parties.

1996, ruled, in sweeping, unequivocal language, that "Plaintiffs are on notice that no cost whatsoever associated with complying with Interrogatory 8 will ever be borne by the Government, none whatsoever." Defendant contends that these sanctions are law of the case and should be respected in the lodestar calculation. Plaintiffs retort that there should be no such reduction of fees because the sanctions were improperly assessed and, at all events, the parties, in the course of negotiating the Agreement, bargained away the sanction. They claim that the latter point is illustrated by the fact that the Agreement fails to mention the sanctions.

This court refuses to disturb Judge Miller's sanctions rulings, finding, as defendant urges, that the "law of the case" doctrine fully applies here. That principle "is a judicially created doctrine," under which "a court will generally refuse to reopen or reconsider what has already been decided at an earlier stage of the litigation." *Suel v. Secretary of Health and Human Services*, 192 F.3d 981, 984-85 (Fed.Cir.1999); *see also Mendenhall & CMI Corp. v. Barber-Greene Co.*, 26 F.3d 1573, 1582 (Fed.Cir.1994), *cert denied*, 513 U.S. 1018, 115 S.Ct. 581, 130 L.Ed.2d 496 (1994). To be sure, the doctrine is more normative than binding--the Supreme Court has instructed that the doctrine " 'merely expresses the practice of courts generally to refuse to reopen what has been decided,' but does not 'limit [ ] their power.' " *Christianson v. Colt Indus. Operating Corp.*, 486 U.S. 800, 817, 108 S.Ct. 2166, 100 L.Ed.2d 811 (1988) (quoting *Messenger v. Anderson*, 225 U.S. 436, 444, 32 S.Ct. 739, 56 L.Ed. 1152 (1912) (Holmes, J.)); *see also Drury v. United States*, 52 Fed.Cl. 402, 404-05 (2002). Yet, in the interests of judicial economy and to promote consistency of decision, most courts are loathe to relitigate matters already adjudicated absent some indication of extraordinary circumstances. *See Christianson*, 486 U.S. at 817, 108 S.Ct. 2166; *Mendenhall*, 26 F.3d at 1582; 18B *Charles Alan Wright, Arthur R. Miller & Edward H. Cooper,*

Federal Practice and Procedure: Jurisdiction 2d § 4478 (2d ed.2002).

Certainly, a reassignment to another judge should not be viewed as declaring open season on relitigating any prior rulings with which a party disagrees. *See Best v. Shell Oil* Co., 107 F.3d 544, 546 (7th Cir.1997) (stating the law of case doctrine "reflects the rightful expectation of litigants that a change in judges midway through a case will not mean going back to square one"). Indeed, the interests underlying the "law of the case" doctrine seemingly are at their zenith, where, as here, another judge, prior to reassignment, exercises discretion in addressing perceived misfeasance. *See, e.g., Williams v. Commissioner*, 1 F.3d 502, 503-04 (7th Cir.1993).[23] Nonetheless, arguing that extraordinary circumstances exist here, plaintiffs assert that the court should act "to avoid clear error and prevent manifest injustice." However, in support of this claim, plaintiffs offer little more than a rewarmed version of the same excuses they presented to Judge Miller, palliatively respiced, to be sure, with their attorneys' apodictic testimony at the evidentiary hearing that they did not intend to willfully disobey her discovery orders. Judge Miller, however, carefully reviewed essentially the same facts and protestations and concluded otherwise. Stripped of its toppings, plaintiffs' assertions before this court amount to nothing more than a bald request

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[23] In *Williams*, Judge Posner observed that law of the case considerations resonate particularly where a prior ruling was based upon an exercise of discretion, noting that the deference accorded such exercises of discretion recognizes that different judges might react to the same circumstances differently and yet not commit reversible error. 1 F.3d at 503; *see also* 18B *Charles Alan Wright, Arthur R. Miller & Edward H. Cooper, Federal Practice and Procedure: Jurisdiction 2d* § 4478 at 637 (2d ed.2002) (noting that the "simple principle of disciplined self-consistency" is "augmented by comity concerns when one judge ... is asked to reconsider the ruling of a different judge").

for a reconsideration of her rulings. That this court will not do.[24]

Plaintiffs next assert that the sanctions imposed by Judge Miller were waived under the Agreement. This assertion, however, begs the question are such sanctions waivable? The courts are relatively uniform in holding that parties may not bargain away a court-imposed sanction that is non-monetary or payable to the court, *see*, *e.g.*, *Clark Equip. Co. v. Lift Parts Mfg. Co., Inc.*, 972 F.2d 817, 819 (7th Cir.1992). They, however, are in significant disagreement when a monetary sanctions flows not to the court, but to a party. Several cases, some of which analogize the situation to the settlement of a tort action, hold that the beneficiary of a court-imposed monetary sanction may agree to waive that sanction, *see*, *e.g.*, *Clark Equipment*, 972 F.2d at 819; while other decisions, stressing the need to preserve judicial integrity and compliance with the rules of procedure, hold otherwise, *see*, *e.g.*, *Perkins v. General Motors Corp.*, 965 F.2d 597, 600 (8th Cir.1992), *cert. denied*, 506 U.S. 1020, 113 S.Ct. 654, 121 L.Ed.2d 581 (1992). In this circuit, this issue is *terra incognita*.

It is unclear whether the sanctions imposed by Judge Miller in this case are the sort that any court would hold is settleable--arguably they may be viewed as non-monetary as they do not require the offending parties to pay money, but rather to forego a benefit. But, assuming, *arguendo*, that they are settleable, there is nothing in the Agreement that suggests that such a bargain was struck here. Given the length and heated nature of the discovery dispute, as well as the tenor of Judge Miller's orders in response thereto, it is highly

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[24] Hesitant to go down this road even a little, the court, nonetheless, observes that, in light of the court's numerous conferences and orders on this subject, plaintiffs' claim that the situation regarding Interrogatory 8 was all one big misunderstanding has a decidedly hollow ring.

unlikely--incredible, actually--that such a contentious issue would be resolved in the Agreement *sub silentio*. Indeed, the same considerations that cast a shadow on the notion that a court-imposed sanction may be bargained away, among them, that a judicial decree is "not merely the property of private litigants," *U.S. Bancorp Mortgage Co. v. Bonner Mall Partnership*, 513 U.S. 18, 26, 115 S.Ct. 386, 130 L.Ed.2d 233 (1994), indisputably command that this court ought not *imply* such an agreement. In fact, contrary to plaintiffs' importunings, it is the court's view that, giving full effect to the Agreement, any fees associated with sanctioned conduct are *per se* not "reasonable" and, therefore, unrecoverable. As such, in the absence of any explicit waiver of the sanctions in the Agreement, this court construes the phrase "reasonable" attorneys fees as not including fees associated with Interrogatory 8.

Turning to more mundane matters, the parties also disagree as to the amount of fees properly attributable to that interrogatory. Combing the billing records, defendant has identified $190,702 in such fees, while plaintiffs claim that figure should be only $92,064. The difference between these figures is driven primarily by the parties' distinctly different views regarding the breadth of the sanctions. According to plaintiffs, although Interrogatory 8 broadly asked "the amount of property that has been lost or taken since each Plaintiff purchased the property," the discovery dispute concerned only the two areas in which plaintiffs' response to that interrogatory were deemed deficient--dune and bluff loss and property loss resulting from the state's movement of the Coastal Construction Control Line. As indicated above, however, Judge Miller's sanction orders are not so limited and, in particular, make no distinction between the costs associated with reasonably complying with interrogatory 8 and those unreasonably incurred.[25] Accordingly, in the

[25] Aside from the language quoted above, the formal order that initially imposed the sanction contained no mention of an

exercise of its discretion, and based upon its review of the record in this case, the court will exclude from the lodestar all time associated in any way with Interrogatory 8, and accepts defendant's figure of $190,702 as the proper amount attributable to these efforts.

Defendant next asserts that the lodestar should be reduced by eliminating hours expended on three matters that, in its estimation, did not contribute to the successful outcome of the case: (i) plaintiffs' unsuccessful efforts to recuse Judge Miller; (ii) their failed appeal of a sanction order; and (iii) their withdrawn motion for sanctions against defendant. Defendant calculates that the hours associated with these tasks translate into approximately $82,000 in fees that should not be recovered. Plaintiffs argue that these fees are reasonable and thus appropriately recovered under the Agreement. They assert that defendant is seeking improperly to inject into the Agreement the statutory concept of a "prevailing" party and the limitations that the case law has associated therewith. On this count, plaintiffs have the better case.

While, as observed above, the case *sub judice* is analogous to a fee-shifting case, care must be taken lest this analogy be carried too far. In particular, there is no requirement in the Agreement akin to the "prevailing party" language found in some fee-shifting statutes. Yet even if the case law applying this requirement were applicable here, perhaps on the notion that a "prevailing party" requirement is implicit in what is "reasonable,"[26] there still would be no basis for excluding the

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apportionment, noting instead that "the Government will not be liable for any expert or attorneys' fees and costs incurred by plaintiffs relating to defendant's Interrogatory No. 8." *Applegate v. United States*, 35 Fed.Cl. 47, 58 (1996).

[26] On several occasions, the Supreme Court has implied a "prevailing party" requirement even if the express statutory language did not so provide. *See, e.g., Ruckelshaus v. Sierra Club*, 463 U.S. 680, 683-94, 103 S.Ct. 3274, 77 L.Ed.2d 938 (1983).

time cited by defendant from the lodestar calculation. For example, in *Hensley*, 461 U.S. at 435, 103 S.Ct. 1933, in dealing with a "prevailing party" statute, the Supreme Court emphasized that a party could receive a full measure of attorneys fees even if it did not prevail on every ground in support of a claim, stating "[l]itigants in good faith may raise alternative legal grounds for a desired outcome, and the court's rejection of or failure to reach certain grounds is not a sufficient reason for reducing a fee. The result is what matters."[27] Relatedly, the courts have concluded that when a plaintiff receives the result sought, the lodestar cannot be adjusted downward simply because the plaintiff did not prevail on every tactical maneuver attempted to obtain the result. *See, e.g., Perry v. Bartlett*, 231 F.3d 155, 163 (4th Cir.2000) (finding the district court did not abuse its discretion in awarding attorneys fees to a prevailing party for an earlier, unsuccessful interlocutory appeal), *cert. denied*, 532 U.S. 905, 121 S.Ct. 1229, 149 L.Ed.2d 138 (2001); Conte at § 4.18 (citing cases). Thus, the courts generally have rejected a "mechanical claim-chopping approach" of the sort advocated by defendant here. *See Lenard v. Argento*, 808 F.2d 1242, 1245 (7th Cir.1987).

While, with perfect 20-20 hindsight, it may be clear now that the tasks identified by defendant were ill-conceived, this court finds that these matters were not so divorced from

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Research reveals, however, that these cases ordinarily deal with the question whether a losing party may be allowed to recover fees where a statute provides for a fee award when "appropriate" or "in the interest of justice." *See* 1 *Derner and Wolf, Court Awarded Attorneys Fees* ¶ 8.02[2][b] (2001). As such, these cases arguably are distinguishable.

[27] *See also id.* at 434, 103 S.Ct. 1933; *City of Riverside v. Rivera*, 477 U.S. 561, 569, 106 S.Ct. 2686, 91 L.Ed.2d 466 (1986); *Davis v. Locke*, 936 F.2d 1208, 1214 (11th Cir.1991) (finding it appropriate not to reduce attorneys' fee award when the plaintiff presented five legal theories of liability, but prevailed on only one of them); 1 *Alba Conte, Attorney Fee Awards* § 4.17 (2d ed. 1993) (Conte).

plaintiffs' ultimate success in this litigation as to lead to a further reduction in the lodestar calculation. *See Cabrales v. County of Los Angeles*, 935 F.2d 1050, 1053 (9th Cir.1991) ("[A] plaintiff who is unsuccessful at a stage of litigation that was a necessary step to her ultimate victory is entitled to attorney's fees even for the unsuccessful stage."). As was recently stated by the First Circuit, albeit in a different context--

> The practice of law is not a mechanical exercise (like, say, kicking a foot press), and a reviewing court must not lean too heavily on hindsight; a lawyer's acts and omissions must be judged on the basis of what he knew, or should have known, at the time his tactical choices were made and implemented.

Ouber v. Guarino, 293 F.3d 19, 25 (1st Cir.2002) (citing *Bell v. Cone*, 535 U.S. 685, ----, 122 S.Ct. 1843, 1854, 152 L.Ed.2d 914 (2002)). While this court certainly does not wish to encourage overly aggressive tactics, the fact remains that, unlike plaintiffs' actions with respect to Interrogatory 8, there has been no showing that the tasks identified by defendant were unreasonable when originally conceived and effectuated. Nor is there any indication that these actions were frivolous or otherwise undertaken in bad faith. Accordingly, this court refuses to segregate the fees associated with these activities from the overall hours billed by Gray Harris.

Finally, defendant bemoans the quality of the billing records submitted by plaintiffs' attorneys, arguing that the lodestar should be reduced due to the inadequacy of various entries therein. To be sure, plaintiffs have the burden of submitting evidence to support the number of hours their attorneys expended. *See Delaware Valley*, 478 U.S. at 564, 106 S.Ct. 3088. Regarding this requirement, the Supreme Court has explained that an attorney "should exercise 'billing judgment' with respect to hours worked ... and should

maintain billing time records in a manner that will enable a reviewing court to identify distinct claims." *Hensley*, 461 U.S. at 437, 103 S.Ct. 1933. At the same time, the Court emphasized that an attorney is "not required to record in great detail how each minute of his time was expended," but "at least" should "identify the general subject matter of his time expenditures." *Hensley*, 461 U.S. at 437 n. 12, 103 S.Ct. 1933; *see also Naporano Iron and Metal Co. v. United States*, 825 F.2d 403, 404 (Fed.Cir.1987) ("Contemporaneous records of attorney's time and usual billing rates, as well as a breakdown of expenses, are necessary in order to determine the reasonableness of the charges."). Relying on *Hensley*, this court has added that the records must "be in sufficient detail that a neutral judge can make a fair evaluation of the time expended, the nature and the need for the service, and the reasonable fee to be allowed." *Martin v. United States*, 12 Cl.Ct. 223, 227 (1987); *see also KMS Fusion, Inc. v. United States*, 39 Fed.Cl. 593, 601 (1997); *Design and Production, Inc. v. United States*, 20 Cl.Ct. 207, 219-20 (1990); *Davis v. Secretary of Health and Human Services*, 19 Cl.Ct. 395, 402 (1990).

Seeking to separate wheat from chaff, defendant urges this court to exercise its discretion to reduce the lodestar by at least 40 percent in order to deny plaintiffs recovery for "vague and block-billed" entries in their contemporaneous billing records.[28] In this regard, defendant has highlighted several generalized entries that appear repeatedly in plaintiffs' submitted records, such as "meeting with attorneys," "preparing for team meeting," and "working on

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[28] As defendant notes, numerous courts have held that where an hour-by-hour review of all the time claimed is impossible, a court may, to reflect improper billing practices, simply apply a percentage of reduction to all time claimed. *See, e.g., Freiler v. Tangipahoa Parish Bd. of Educ.*, 185 F.3d 337, 349 (5th Cir.1999), *cert. denied*, 530 U.S. 1251, 120 S.Ct. 2706, 147 L.Ed.2d 974 (2000).

case." To buttress this claim, defendant relies on the testimony of its expert witness, Ms. Ann F. Gillooly, who testified that approximately 25 percent of plaintiffs' entries for 1995 and 1996 should be eliminated as unreasonable because they were "block billed," "excessive," or "duplicative." Plaintiffs respond that their testimony established that their fee submissions are in accord with Gray Harris' regular billing practices, which practices, they further contend, comport with general billing practices in their legal community, as well as the requirements of the case law. Plaintiffs discount the testimony of Ms. Gillooly, noting that she testified that her opinion of the billing records was based not on normal billing practices, but rather corporate standards that she developed while working in the general counsel's office of Mobil Corporation.

After carefully reviewing the instant record, the court agrees that some of the entries in the billing records are somewhat cryptic or short on details. In at least some instances, however, the lack of detail is cured by cross-checking the time sheets for the various attorneys who worked on this case and by reviewing docket entries to determine what specific filings were being made at particular times. Moreover, some of the specific entries cited by defendant appear to have more than adequate detail.[29] Assessing whether the remaining entries cited by defendant are adequately documented is complicated by the lack of a definitive standard. The case law is decidedly murky and runs the gamut, with some decisions clearly disallowing

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[29] For example, one entry cited by defendant for February 20, 1996, lists 6.5 hours for "Preparing responses and replies to pending motion etc.; reviewing Court Orders;" another, dated August 4, 1995, lists a meeting and identifies, by name, all the participants, including government counsel. The latter entry was apparently deemed deficient by defendant because it does not list a subject, although one might reasonably ask why defendant could not check its own records to obtain that information.

entries similar to those encountered here, and others finding the same types of entries acceptable.[30] Placing the Federal Circuit and this court on this continuum is no easy task, but it appears that those courts tend toward the somewhat more lenient side of the spectrum. Thus, in rejecting arguments that documentation was insufficiently itemized, the Federal Circuit and this court have tended to emphasize that all that is required is "typical billing records." *Beta Systems, Inc. v. United States*, 866 F.2d 1404, 1406-07 (Fed.Cir.1989); *see also Community Heating & Plumbing Co., Inc. v. Garrett*, 2 F.3d 1143, 1146 (Fed.Cir.1993); *KMS Fusion, Inc.*, 39 Fed.Cl. at 601. And when they have rejected documentation for a fee, those courts have generally been faced with reconstructed or other forms of *post hoc* records, which, by their nature, include far less detail than the contemporaneous

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[30] *Compare Michigan v. U.S. Envt'l Protection Agency*, 254 F.3d 1087, 1093-1095 (D.C.Cir.2001) (discounting for inadequate documentation, billing documents that included various references to "telephone conferences," "conference calls," and "review record"); *Case v. Unified School Dist. No. 233, Johnson County*, 157 F.3d 1243, 1252 (10th Cir.1998) (finding billing statements for time on "memo," "research," and "draft outline" were too imprecise for fee award); *H.J. Inc. v. Flygt Corp.*, 925 F.2d 257, 260 (8th Cir.1991) (upholding a reduction of hours for entries such as "legal research," "trial preparation," and "met with client"); *with Fischer*, 214 F.3d at 1121 (noting that "plaintiff's counsel can meet this burden--although just barely--by simply listing his hours and 'identifying the general subject matter of his time expenditure.' "); *Louisiana Power & Light Co. v. Kellstrom*, 50 F.3d 319, 327 (5th Cir.1995) (upholding district court decision to accept time for "pleadings," or "correspondence," noting that "we are mindful that practical considerations of the daily practice of law in this day and age preclude 'writing a book' to describe in excruciating detail the professional services rendered for each hour or fraction of an hour."), *cert. denied*, 516 U.S. 862, 116 S.Ct. 173, 133 L.Ed.2d 113 (1995); *Rode v. Dellarciprete*, 892 F.2d 1177, 1190 (3d Cir.1990) ("[I]t is not necessary to know the exact number of minutes spent nor the precise activity to which each hour was devoted nor the specific attainments of each attorney.").

records presented here. *See, e.g., Naporano*, 825 F.2d at 404 (rejecting summary document that showed total billings for the month and noting that "[t]he court needs contemporaneous records of exact time spent on the case, by whom, their status and usual billing rates.").

Based on what it can glean from these cases, this court finds that the entries supporting plaintiffs' fee submission range from adequate to barely adequate--but adequate, nonetheless. In particular, the court finds that, given the overall level of detail, the fact that some of the entries cited by defendant do not list subjects is not disqualifying. *See KMS Fusion*, 39 Fed.Cl. at 600 ("As a practical matter, certain tasks performed by attorneys are not amenable to issue-based recordkeeping. For example, for an attorney to attempt to break down the time spent drafting a complaint on an issue-by-issue basis would not be productive."). In the court's view, this conclusion is consistent not only with the Supreme Court's instructions in *Hensley* and the prior jurisprudence in this circuit, but also with the overarching mandate that the fees awarded here be "reasonable." As such, the court will not reduce the lodestar calculation further for inadequate documentation.[31]

In sum, the court finds that plaintiffs' award shall be reduced by any fees and costs associated in any way with Interrogatory 8, and accepts defendant's figure of $190,702

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[31] In so finding, the court rejects the conclusions of defendant's expert, Ms. Ann Gilooly, who testified regarding the adequacy of the billing records in this case. As plaintiff notes, her testimony was based upon audit standards developed by Mobil Corporation during the mid-1990's to assess the performance of law firms that had long-standing and continuous relationships with that company. Under questioning, Ms. Gilooly admitted that her conclusions did not reflect the adequacy of these records for any other purposes, including, notably, what kind of documentation would be considered adequate by courts seeking to determine a "reasonable fee."

as the proper amount attributable to these efforts. The court, however, rejects defendant's arguments that the lodestar should be reduced further to reflect the time associated with unsuccessful arguments or the asserted inadequacy of Gray Harris' billing records.[32]

2. Enhancement for Delay

Plaintiffs next seek to adjust the lodestar to take into account the "delay in payment" of the fees in two alternative fashions: (i) by adjusting the historic fees to reflect the current hourly rates of individuals who still are employed by the firm and the present current value of the personnel no longer with the firm; or (ii) by adjusting their historic fees to present value utilizing compound interest. Neither of these adjustments is appropriate.

Plaintiffs note that, in other settings, courts have readily adjusted historic hourly fees--either to current hourly rates or by an inflation factor--in order to compensate for delay. *See, e.g., Missouri v. Jenkins*, 491 U.S. at 284, 109 S.Ct. 2463; Conti at § 4.08 (citing numerous cases). None of the cases cited by plaintiffs, however, are apposite. They are not cases against the United States and thus were not required to account for the axiom that "interest cannot be recovered in a suit against the Government in the absence of an express waiver of sovereign immunity from an award of interest." *Shaw*, 478 U.S. at 311, 106 S.Ct. 2957. Plaintiffs' request to be compensated for "delay" is tantamount to a request for interest on their attorneys fees. As the Court indicated in *Shaw*, in which the court barred recovery of a delay enhancement on an award of reasonable attorneys fees, "the

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[32] The court also rejects defendant's glancing argument regarding plaintiffs' use of multiple attorneys to perform particular tasks. Based on the complexity of the issues in this case, the court finds that the use of multiple attorneys was reasonable and likely contributed to the ultimate success in this matter.

force of the no-interest rule cannot be avoided simply by devising a new name for an old institution." 478 U.S. at 321, 106 S.Ct. 2957. More specifically, the court stated "[i]nterest and a delay factor share an identical function. They are designed to compensate for the belated receipt of money." *Id.* at 322, 106 S.Ct. 2957. Plaintiffs' request for a delay enhancement thus collides with the no-interest rule of *Shaw* and its progeny. *See Chiu v. United States*, 948 F.2d 711, 719-20 (Fed.Cir.1991) (refusing to enhance attorneys fee for "adjustment for loss of use of the money by reason of delay"); *United States v. Mescalero Apache Tribe*, 207 Ct.Cl. 369, 518 F.2d 1309, 1322 (1975), *cert. denied*, 425 U.S. 911, 96 S.Ct. 1506, 47 L.Ed.2d 761 (1976); *see also* 10 *Moore's Federal Practice* § 54.190[3][e] (Mathew Bender 3d ed.2002) (noting general approval of a delay adjustment, but observing that "[i]f the opponent is the United States, sovereign immunity prevents the implementation of any delay enhancement.").

As noted above, in *Shaw*, the Supreme Court indicated that the no- interest rule may be waived either in a statute or a contract. *Shaw*, 478 U.S. at 317, 106 S.Ct. 2957. Because waivers of sovereign immunity as to interest must specifically reference such an allowance, a general waiver as to attorneys' fees, without more, does not waive the sovereign's immunity from interest. *Shaw*, 478 U.S. at 318-19, 106 S.Ct. 2957; *see also Preseault*, 52 Fed.Cl. at 677.[33]

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[33] Plaintiffs cite various cases in support of its claim for a "delay in payment enhancement." Most of these case involve situations in which courts have awarded interest on a taking judgment in order to ensure "just compensation," and for the reasons discussed are inapplicable where a plaintiff seeks interest on an attorney's fees. *See, e.g., Jacobs v. United States*, 290 U.S. 13, 16-17, 54 S.Ct. 26, 78 L.Ed. 142 (1933). Others of the cases cited involve attorneys fees, but are still inapposite as they do not involve awards against the United States or its agencies and thus present no issues involving sovereign immunity. *See, e.g., Washington Public Power*, 19 F.3d at 1305; *Walker*, 99 F.3d at 773. The one case that applies compound interest to an attorneys fees award

Here, there is neither a waiver in any statute, nor in the Agreement itself--the absence of any reference to interest on attorneys fees is particularly telling given that the Agreement explicitly provides for interest on other parts of the settlement compensation. *Compare Woolf v. Bowles*, 57 F.3d 407, 409 (1995).

To be sure, the courts have ruled that the Fifth Amendment itself provides for interest as an aspect of "just compensation." *Shaw*, 478 U.S. at 317 n. 5, 106 S.Ct. 2957; *see also Smith v. Principi*, 281 F.3d 1384, 1388 (Fed.Cir.2002). But, this conclusion derives from the principle that just compensation is "for the property, and not to the owner." *Monongahela Navigation Co. v. United States*, 148 U.S. 312, 326, 13 S.Ct. 622, 37 L.Ed. 463 (1893); *see also United States v. Bodcaw, Co.*, 440 U.S. 202, 203, 99 S.Ct. 1066, 59 L.Ed.2d 257 (1979). As such, various decisions clearly indicate that "[a]ttorneys' fees and expenses are not embraced within just compensation for land taken by eminent domain." *Dohany v. Rogers*, 281 U.S. 362, 368, 50 S.Ct. 299, 74 L.Ed. 904 (1930); *see also Shaw*, 478 U.S. at 317, 106 S.Ct. 2957; *Calhoun v. United States*, 197 Ct.Cl. 41, 453 F.2d 1385, 1395 (1972); *Preseault*, 52 Fed.Cl. at 677. Accordingly, the enhancement here of attorneys fees for delay is not a matter of constitutional command.

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against the United States, *Florida Rock Industries v. United States*, 2000 WL 331830 (March 28, 2000), does so in summary fashion, without considering whatsoever the Supreme Court precedent and other case law to the contrary. Accordingly, this court chooses not to follow this decision. The court also observes that in invoking these authorities, plaintiffs seem to turn a blind eye to the fact that their recovery is based upon the Agreement and not a judicial finding of "just compensation" under the Fifth Amendment.

Therefore, in the court's view, there is no statutory, contractual or constitutional basis for enhancing the lodestar for the asserted "delay in payment."[34]

3. Enhancement for Other Factors

As noted above, some cases suggest that the factors not reflected in the lodestar, which, in the "rare" and "exceptional" case, may lead to enhancement of the lodestar, are two-fold: the exceptional results obtained and the undesirability of the case. In general, enhancements must be supported by specific evidence in the record and detailed findings by the lower court. *Id.*; *Delaware Valley*, 478 U.S. at 565, 106 S.Ct. 3088. The applicant bears the burden of demonstrating that the lodestar amount must be enhanced to constitute a reasonable fee. *Blum*, 465 U.S. at 898, 104 S.Ct. 1541.

Plaintiffs first claim that the lodestar should be enhanced for the exceptional results they obtained. As noted above, the Supreme Court has, on several occasions, left open the possibility that, in the right circumstances, such results could lead to an enhancement of the lodestar. *See Farrar v. Hobby*, 506 U.S. at 103, 114, 113 S.Ct. 566, 121 L.Ed.2d 494 (1992); *Hensley*, 461 U.S. at 436, 103 S.Ct. 1933. Nonetheless, a review of the case law suggests that this exception is more likely to be described than employed and that, relatedly, proving entitlement under this factor is no easy matter. For example, in *Blum*, the court cautioned that "[b]ecause acknowledgment of the 'results obtained'

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[34] The court further notes that there is no evidence of excessive delay on the part of the defendant. To be sure, this litigation has been long and slow. But, given the nature of the allegations, the complexity of the litigation, and the unusual nature of the resolution of this case, the delay is not unreasonable. Defendant has pursued this case vigorously, as is its right; there is no evidence, however, that it has dragged out the process through frivolous motion practice or obstructionist tactics.

generally will be subsumed within other factors used to calculate a reasonable fee, it normally should not provide an independent basis for increasing the fee award." 465 U.S. at 900, 104 S.Ct. 1541; *see also Delaware Valley*, 478 U.S. at 565, 106 S.Ct. 3088. "Exceptional results are results that are out of the ordinary, unusual, or rare," the Eleventh Circuit has stated, and "results are not exceptional merely because of the nature of the right vindicated or the amount recovered." *Norman v. Housing Auth. of the City of Montgomery*, 836 F.2d 1292, 1302 (11th Cir.1988). Indeed, several courts have held that enhancement for this reason is appropriate only when the fee applicant demonstrates that "it is customary in the area for attorneys to charge an additional fee above their hourly rates for an exceptional result." *Walker*, 99 F.3d at 772; *see also Forshee v. Waterloo Indus., Inc.*, 178 F.3d 527, 532 (8th Cir.1999) ("[T]he fee applicant must do more than establish outstanding service and results."). The latter requirement makes sense because "when an attorney first accepts a case and agrees to represent the client, he obligates himself to perform to the best of his ability and to produce the best possible results commensurate with his skill and his client's interests." *Delaware Valley*, 478 U.S. at 565-66, 106 S.Ct. 3088; *see also Stewart*, 987 F.2d at 1453; *Earth Island Inst. Inc. v. Southern Cal. Edison*, 838 F.Supp. 458, 464 (S.D.Cal.1993).

To be sure, plaintiffs' argument for enhancement due to exceptional results has a patina of plausibility. Ultimately, however, this court rejects this enhancement for several reasons. In the first place, it is far from clear that the results here are exceptional. In pure dollar terms, of course, the settlement here is considerable--but the case law suggests that this alone is insufficient. *See, e.g., Norman*, 836 F.2d at 1302; *Copeland v. Marshall*, 641 F.2d 880, 894 (D.C.Cir.1980) ("it is important again to emphasize that a huge dollar recovery does not itself justify a huge fee

award").[35] Of course, during the evidentiary hearing, plaintiffs produced extensive evidence documenting the benefits received as the result of the beach renourishment. For example, the court was presented with a computerized map of the beachfront south of the Port Canaveral jetties, which, as the cursor moved down this map, displayed "before" and "after" pictures of properties and facilities along the beachfront.[36] The results so depicted, while remarkable, are, nonetheless, precisely what plaintiffs set out to accomplish in filing this suit. Accordingly, measured by plaintiffs' own expectations at the outset of the case, the results obtained were not exceptional, but rather reflect what was owed. Indeed, unlike the select few cases in which enhancements have been granted for exceptional results, the settlement here worked no unexpected change in agency policy, so as unexpectedly to impact significantly beyond the confines of this litigation. *Cf. Hyatt v. Apfel*, 195 F.3d 188,

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[35] Indeed, it bears noting that while approximately $30 million was received under the Agreement, plaintiffs' complaint sought $100 million. *Compare Copeland*, 641 F.2d at 894 ("if a substantial monetary judgment was to be expected, that expectation normally is reflected in the hourly rate used to compute the 'lodestar,' and no further adjustment would be necessary").

[36] The "before" pictures were characterized by remarkable erosion and only gave hint of the beach that had previously existed along these properties by the degree of degradation that was present--collapsed piers and decks, stairwells that once led to the beach hanging off into the air, buildings whose foundations were being undercut, and restaurants and businesses whose "ocean views" were now far too up close and personal. The "after" pictures, taken after the beach was renourished by the Corps, were just as remarkable for their phoenix-like qualities. They showed a broad and bright sandy beach protectively extending from the front of the same properties, with decks, piers and stairways repaired or replaced, foundations no longer threatened and shore businesses obviously thriving. Plaintiffs further documented what the court might have surmised from looking at these paired pictures by producing a study.

192 (4th Cir.1999) (allowing multiplier of 1.33 where plaintiffs "succeeded in bringing about fundamental change to a recalcitrant agency"); *Shipes v. Trinity Indus.*, 987 F.2d 311, 322 (5th Cir.1993), *cert. denied*, 510 U.S. 991, 114 S.Ct. 548, 126 L.Ed.2d 450 (1993) (enhancement for exceptional results may have been warranted where victory provided future protection against discrimination in the form of "injunctive relief").

In the second place, with all due respect, it is dubious that the results obtained here are solely attributable to the efforts of Gray Harris. In particular, it appears that the amount appropriated by Congress for renourishment exceeded the amount initially requested by plaintiffs and undoubtedly was affected by the Florida Congressional delegation's desire to benefit all their constituents, as opposed to the individual plaintiffs in this lawsuit. The court does not believe that plaintiffs' attorneys should receive additional compensation based, at least in part, upon this Congressional largess. Moreover, there is absolutely no evidence that "it is customary in the area for attorneys to charge an additional fee above their hourly rates for an exceptional result." *Walker*, 99 F.3d at 772. This point is particularly compelling given the Supreme Court's admonition that a "reasonable" fee is to be "calculated on the basis of rates and practices prevailing in the relevant market." *Jenkins*, 491 U.S. at 283, 109 S.Ct. 2463. While the record suggests that counsel for plaintiffs generally performed admirably and well, the quality of that representation "generally is reflected in the reasonable hourly rate," and does not warrant an upward adjustment in this case. *Blum*, 465 U.S. at 889, 104 S.Ct. 1541; *see also Abrams v. Baylor College of Medicine*, 805 F.2d 528, 537 (5th Cir.1986). In short, in the absence of evidence that a private individual would have extracontractually rewarded his counsel with payment in excess of that attorney's hourly rate, this court is disinclined to impose a similar obligation on the United States.

Plaintiff also seeks enhancement asserting that this case was "unattractive" or "undesirable." The Supreme Court has not yet directly addressed whether this factor is an appropriate basis for enhancing a lodestar fee. To the extent a case's "undesirability" turns on the difficulty of establishing the merits, however, that consideration appears foreclosed by the rationale of the Supreme Court's precedents--as noted in *Dague*, "the difficulty of establishing [the] merits ... is ordinarily reflected in the lodestar--either in the higher number of hours expended to overcome the difficulty, or in the higher hourly rate of the attorney skilled and experienced enough to do so." 505 U.S. at 562, 112 S.Ct. 2638. Splintering these concepts further, however, several cases hold that an enhancement for "undesirability" may apply where a plaintiff, or the type of case he or she brings, is unpopular and the plaintiff thus "is unlikely to prevail for reasons having nothing to do with the merits of the claim or the quality of the attorney's performance." *Gomez v. Gates*, 804 F.Supp. 69, 75 (C.D.Cal.1992) (identifying civil rights cases involving the use of allegedly excessive force against unsavory clients as one such category of case).[37] But, arguably, this formulation still implicates a party's ability to prevail on the merits--a lawyer might possess special skills or be required to expend additional hours to compensate for such hardships. On the other hand, in originally identifying this factor, the Fifth Circuit asserted that the "detriment" associated with the handling an unpopular case involves lost goodwill and client opportunities and thus cannot be compensated for by charging for additional hours in the case itself. *See Johnson*, 488 F.2d at 719 (describing this factor as applying where a case is "not pleasantly received by the community or ...

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[37] *See also Guam Soc.* of *Obstetricians and Gynecologists v. Ada*, 100 F.3d 691, 699 (9th Cir.1996), *cert. denied*, 522 U.S. 949, 118 S.Ct. 367, 139 L.Ed.2d 286 (1997); *Alberti v. Klevenhagen*, 903 F.2d 352 (5th Cir.1990); *Johnson*, 488 F.2d at 719.

contemporaries" that could have "an economic impact on his practice").

Reconciliation of these competing forces is unnecessary, as the facts here demonstrate that Gray Harris was not prosecuting an unattractive case, but rather pursuing a cause *celeb*--the type of case that a firm with local roots likely would embrace and seek to publicize to its clients and prospective clients as an indication of its community involvement. As such, apart from its questionable legality, the court finds that a lodestar enhancement for "unattractiveness" or "undesirability" is wholly unwarranted by the facts of this case.

In light of the foregoing discussion, this court concludes that the case *sub judice is* not one of those "rare" and "exceptional" cases that warrants a multiplier of the lodestar.

III. Conclusion

This court need go no further. Counsel for both sides performed admirably in presenting their cases on this matter, thereby both facilitating and complicating the decision herein. For the foregoing reasons, this court concludes that plaintiffs are entitled to receive "reasonable" attorneys fees in the amount of $1,803,575. The Clerk shall enter an appropriate judgment.

IT IS SO ORDERED.

Supreme Court, U.S.
FILED
DEC 15 2003
OFFICE OF THE CLERK

No. 03-552

In the Supreme Court of the United States

DON APPLEGATE, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the Court of Federal Claims erred in determining what constitutes "reasonable attorneys' fees" under a settlement agreement by reference to principles expressed in this Court's fee-shifting cases.

2. Whether the Court of Federal Claims abused its discretion in concluding that the attorneys' fee award should not be subject to an "exceptional results" multiplier.

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OPINIONS BELOW

The judgment of the court of appeals (Pet. App. 1a-2a) is not published in the *Federal Reporter* but is reprinted in 70 Fed. Appx. 582. The opinion of the Court of Federal Claims (Pet. App. 3a- 49a) is reported at 52 Fed. Cl. 751.

JURISDICTION

The judgment of the court of appeals was entered on July 17, 2003. The petition for a writ of certiorari was filed on October 14, 2003. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Petitioners are landowners in Brevard County, Florida, who brought an inverse condemnation action against the United States. They alleged that the government's construction, maintenance, and operation of jetties at Port Canaveral caused erosion of beach holdings south of Cape Canaveral. Pet. App. 4a. The parties settled the action under an agreement in which the United States agreed to pay petitioners $5 million and to provide (contingent on congressional appropriations) beach fill placement in two areas. *Id.* at 6a. The settlement agreement provided that "[t]he United States shall also pay to Plaintiffs attorneys' fees" and that, "[f]or purposes of this Settlement Agreement, Plaintiffs are entitled to recover reasonable attorneys' fees and costs." C.A. App. 365. The agreement provided that if the parties could not agree on the amount of fees and costs, a reasonable amount would be determined by the Court of Federal Claims "following the submission of documentation of said costs and fees." *Id.* at 366.[1]

Following Congress's appropriation of funds necessary for the beach fill project, petitioners filed a motion seeking $1,990,189 in attorneys' fees, along with additional costs and expert fees. Pet. App. 7a. Petitioners later filed an amended motion seeking a much larger fee award. C.A. App. 378-396. In the amended motion, petitioners asserted that they were entitled either to fees

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[1] The settlement agreement does not mention petitioners' private fee agreements with their attorneys. Those contracts provide that, if the litigation is successful, petitioners would pay costs and a fee equal to one-third of the value of the benefits obtained by the suit, or 40% if an appeal is involved, out of their recovery. Pet. App. 4a.

equivalent to 40% of the landowners' monetary and non-monetary benefits, which would generate a fee of more than $12 million, or to fees equivalent to an enhanced lodestar amount, which petitioners calculated to be more than $6 million. *Id.* at 393. The parties were not able to agree on the proper amount of "reasonable" attorneys' fees. After briefing and a two-day evidentiary hearing, the Court of Federal Claims determined that reasonable attorneys' fees amounted to $1,803,575. Pet. App. 4a, 49a.

In reaching its determination, the court rejected petitioners' attempts to analogize the case to a "common fund" case, pointing out that the settlement agreement did not create an identifiable common fund from which fees could be taken, but instead required the United States to pay the fees. Pet. App. 20a-21a. The court accordingly concluded that it was more appropriate to draw on statutory fee-shifting principles, which calculate a "lodestar" amount based on hours reasonably expended on the litigation multiplied by a reasonable hourly rate. *Id* at 23a. The court concluded from contemporaneous billing records both the reasonable number of hours petitioners' counsel spent on the matter and reasonable hourly rates, yielding a lodestar of $1,994,277. *Id.* at 29a.

The court reduced the lodestar amount by $190,702 as a result of an earlier sanctions order that barred petitioners from recovering any attorneys' fees for one phase of the litigation. Pet. App. 29a-34a. The court rejected the government's arguments that other reductions should be made to the lodestar to eliminate hours spent on certain unsuccessful arguments and because of inadequate documentation. *Id.* at 34a-41a. The court also rejected petitioners' efforts to enhance the lodestar to compensate for delay in payment and for allegedly

"exceptional results," obtained in the litigation. *Id.* at 41a-49a.

The court of appeals affirmed the judgment without opinion. Pet. App. 1a-2a.

ARGUMENT

The Court of Federal Claims correctly determined the amount of "reasonable" attorneys' fees in accordance with the parties' settlement agreement. The court of appeals' unpublished affirmance of that decision, which interprets and applies the terms of a particular agreement, does not conflict with any decision of this Court or another court of appeals, and it does not present an issue of broad national significance or one that is even likely to recur. This Court's review is not warranted.

1. Petitioners contend that the Court of Federal Claims erred because it allegedly "deemed itself bound by the prohibitions of this Court's statutory fee-shifting jurisprudence, limited itself to a severely restricted lodestar calculation, [and] refused to consider the relevance of Petitioner's contingent fee agreements." Pet. 3. Petitioners are mistaken in their characterization of the lower court's decision.[2]

The Court of Federal Claims explained that it was "evaluating what is 'reasonable' within the meaning of

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[2] There is also no support in the record for petitioners' statement (Pet. 3) that "undisputed testimony and Respondent's admissions established that Petitioners' contingent fee agreements were reasonable." Petitioners simply cite their own appellate briefs in support of that assertion. The petition contains many factual assertions that are based solely on statements in petitioners' appellate briefs. See, *e.g.*, Pet. 3, 8, 9, 10 n.9, 18 n.15, 24 n.16, 25 n.17. The Court has no obligation to credit as true statements that are unsupported by any findings or record evidence.

the Agreement." Pet. App. 8a. It then considered "cases construing * * * fee-shifting provisions, as well as those involving the 'common fund' doctrine * * * to harvest the principles for determining what is a 'reasonable' fee here." *Id.* at 10a. It considered "whether—and to what extent—this case is more appropriately analogized to a statutory fee case, as opposed to a common fund case," *id.* at 19a, and it ultimately determined that "this case is most analogous to a fee shifting matter," *id.* at 21a. The court determined that fee shifting was the appropriate analogy here because the settlement agreement called for fees to be paid by the United States rather than paid out of petitioners' recovery. *Id.* at 22a-23a. The court used principles from statutory fee shifting cases as a guide for determining a "reasonable" fee, noting that this Court has found in such cases that there is a "'strong presumption' that the lodestar represents the 'reasonable fee' promised in most fee-shifting provisions." *Id.* at 26a (quoting *City of Burlington* v. *Dague*, 505 U.S. 557, 562 (1992)).

The Court of Federal Claims plainly did not, as petitioners contend, "hold that this Court's fee-shifting cases are binding upon parties to a settlement agreement that incorporates no fee-shifting statute." See Pet. 11-12. In mischaracterizing the court's decision, petitioners provide no reason to question that court's determination that fee-shifting cases provide the most analogous source of principles for determining a reasonable fee in this case.[3]

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[3] Petitioners ignore a variety of factors, in addition to the source of the fee payment, that support the court's determination to seek guidance from fee-shifting cases. First, had this inverse condemnation suit been litigated to conclusion and petitioners

Petitioners' claims (Pet. 5) of a "conflict" with decisions of this Court and other circuit courts are without substance. Petitioners first contend (Pet. 13-16 & n.14) that *Gisbrecht* v. *Barnhart*, 535 U.S. 789 (2002), requires that a court consider the reasonableness of existing contingent fee agreements. That decision, which petitioners never brought to the attention of the Court of Federal Claims or the court of appeals, is inapposite. The Court in *Gisbrecht* examined the fee agreements because the fee statute at issue "does not authorize the prevailing party to recover fees from the losing party * * * [but] authorizes fees payable from the successful party's recovery." 535 U.S. at 802 (citing Social Security Act § 206(b), 42 U.S.C. 406(b)). *Gisbrecht* plainly does not suggest that a contingent fee arrangement would be pertinent in a situation, like this case, in which the defendant agrees to pay a reasonable fee that will not be taken out of the amount of recovery. Indeed,

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prevailed, fees would have been controlled by a fee-shifting statute —the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970, 42 U.S.C. 4654(c). That fee-shifting statute formed the backdrop for the negotiation of the settlement agreement. Second, the settlement agreement required "the submission of documentation of said costs and fees," C.A. App. 366, which is consistent with a fee award based on hours reasonably expended, rather than on a percentage of recovery. Third, the agreement said nothing suggesting an intent to incorporate the contingent fee agreements petitioners had entered into with their attorneys. Finally, petitioners' initial fee application sought fees in the amount of $1,990,189, reflecting the lodestar approach, rather than a contingent fee. Pet. App. 7a; see *id.* at 29a. Hence, petitioners' own conduct confirms that the parties contemplated use of a lodestar approach—until petitioners filed an amended fee application seeking a dramatically larger award and raising for the first time the theory that an award should be based on the contingent fee contracts.

Gisbrecht supports the Court of Federal Claims' emphasis on the fact that the agreement called for a payment by the United States rather than out of the plaintiffs' recovery in drawing an analogy to fee-shifting statutes.[4]

Petitioners also suggest (Pet. 18-22) that the Court of Federal Claim's decision conflicts with *Wing* v. *Asarco Inc.*, 114 F.3d 986 (9th Cir. 1997), and *Dutchak* v. *Central States, Southeast & Southwest Areas Pension Fund*, 932 F.2d 591 (7th Cir. 1991), because those cases found that the parties' intent, as expressed in attorneys' fee settlement agreements, would prevail over conflicting guidance from case authority stemming from either fee-shifting or common fund contexts. There is no conflict, however, because the court in this case took the same view of the primacy of the contract. See, *e.g.*, Pet. App. 23a n.16 ("[T]he court does *not* rely on the fact that this case would have been controlled by

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[4] This Court has consistently stated that contingent fee contracts should not be considered in the typical fee-shifting situation, stating, for example:

> [W]e have said repeatedly that "[t]he initial estimate of a reasonable attorney's fee is properly calculated by multiplying the number of hours reasonably expended on the litigation times a reasonable hourly rate." *Blum* v. *Stenson*, 465 U.S. 886, 888 (1984). The courts may then adjust this lodestar calculation by other factors. We have never suggested that a different approach is to be followed in cases where the prevailing party and his (or her) attorney have executed a contingent-fee agreement.

Blanchard v. *Bergeron*, 489 U.S. 87, 94 (1989); see *Dague*, 505 U.S. at 565-566 ("we have generally turned away from the contingent-fee model–which would make the fee award a percentage of the value of the relief awarded in the primary action–to the lodestar model") (footnote omitted).

a fee-shifting statute had plaintiffs litigated this matter to completion and prevailed. Rather, the focus here is on the terms of the Agreement."). Moreover, the courts in *Wing* and *Dutchak*, like the court in this case, looked to fee-shifting cases for guidance on what constitutes a "reasonable" fee. See *Wing*, 114 F.3d at 989 (citing two fee-shifting cases, *Pennsylvania* v. *Delaware Valley Citizens' Council for Clean Air*, 478 U.S. 546 (1986), and *Blum* v. *Stenson*, 465 U.S. 886 (1984), in determining that an "exceptional results" multiplier to the lodestar was warranted)); *Dutchak*, 932 F.2d at 596-597 (citing *Hensley* v. *Eckerhart*, 461 U.S. 424 (1983), in determining proper lodestar figure).[5]

A trial court has broad discretion in determining what constitutes a "reasonable" attorney fee award, whether under a fee-shifting statute, *Hensley* v. *Eckerhart*, 461 U.S. 424, 437 (1983), or under a settlement agreement that confers that authority on the court. The Court of Federal Claims did not abuse its discretion in determining that the lodestar approach provided a "reasonable" attorneys' fee award for petitioners in this case.

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[5] *Wing* and *Dutchak* permitted the recovery of fees greater than the lodestar amount based on provisions of the particular settlement agreements in those cases that are not present here. In *Wing*, the court of appeals concluded that a fee award equal to twice the lodestar amount was not an abuse of discretion, where the settlement agreement had expressly contemplated a fee award of more than twice the amount of the agreed-upon lodestar figure of $4 million. 114 F.3d at 988. In *Dutchak*, the court of appeals upheld a lodestar multiplier to compensate for the contingent nature of the case, but only because the settlement agreement specifically adopted as guideposts four lower court decisions that had approved contingency multipliers. 932 F.2d at 593 n.1, 595-596. None of these features supporting enhancement of the lodestar were present in the settlement agreement in this case.

2. Petitioners contend (Pet. 22) that even if fee-shifting principles apply, the CFC "used an improper and impossible standard" for determining whether an "exceptional results" multiplier to the lodestar was warranted. In *Dague*, this Court stated that:

> We have established a "strong presumption" that the lodestar represents the "reasonable" fee, *Delaware Valley I, supra*, [478 U.S.] at 565, and have placed upon the fee applicant who seeks more than that the burden of showing that "such an adjustment is *necessary* to the determination of a reasonable fee." *Blum* v. *Stenson*, 465 U.S. 886, 898 (1984).

505 U.S. at 562. In *Blum* v. *Stenson*, 465 U.S. 886 (1994), this Court overturned as an abuse of discretion a fee award that included an "exceptional results" enhancement based upon the complexity of the litigation, the novelty of the issues, the high quality of representation, the great benefit to the class, and the riskiness of the law suit. *Id.* at 898. The Court found that those factors were normally reflected in the number of billable hours claimed and the hourly rates charged. The Court stated that an enhancement to the lodestar could be justified on those grounds "only in the rare case where the fee applicant offers specific evidence to show that the quality of service rendered was superior to that one reasonably should expect in light of the hourly rates charged and that the success was 'exceptional.'" *Id.* at 899.

The Court of Federal Claims applied that standard and, after a comprehensive consideration of petitioners' arguments, concluded that they had not carried their burden of showing that this was one of the "rare" or "exceptional" cases that warrants a multiplier of the lodestar. Pet. App. 44a-49a. In particular, the court

pointed to the facts that: (1) the relief obtained was simply what the complaint sought (and indeed was less than the total asked for); (2) the relief with respect to this project did not affect Corps of Engineers policy generally; (3) the successful resolution of the case was attributable to the substantial efforts of the Florida congressional delegation as well as to the work of plaintiffs and their attorneys; (4) there was no evidence that it was customary in the area for attorneys to charge an additional fee above their hourly rates for an "exceptional" result; and (5) this was not an unattractive case, but one that brought the firm significant positive publicity. *Id.* at 45a-49a.

Petitioners focus on the first of those five factors, contending that the court created a "legal standard for exceptionality" that requires attorneys to obtain relief beyond what the complaint requests. Pet. 24. The court did not, however, elevate that particular consideration to the status of a legal standard. That factor was simply one consideration, among others, that weighed against a finding that petitioners had carried their burden of showing that this was a "rare" case where an enhancement of the lodestar was warranted. The court properly pointed out, for example, that the result here—the rebuilding of a single beach—did not change agency policy or have an impact beyond the confines of the litigation. Pet. App. 46a. The limited nature of the relief distinguishes this case from *Hyatt* v. *Apfel*, 195 F.3d 188 (4th Cir. 1999). The court in that case upheld an enhancement where the litigation had caused the Social Security Administration to promulgate a new nationwide regulation that reversed its past policy and extended the benefits of the suit to "hundreds of thousands of disability claims." *Id.* at 191-192.

The Court of Federal Claims plainly did not abuse its discretion in refusing to award a multiplier in this case.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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IN THE

Supreme Court of the United States

DON APPLEGATE, *et al.*,

Petitioners,

v.

UNITED STATES,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

REPLY BRIEF FOR PETITIONERS

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REPLY BRIEF FOR PETITIONERS*

Respondent does not dispute Petitioners' reading of the law. Respondent admits that the Court of Federal Claims ("CFC") could not interpret the parties' settlement agreement as if fee-shifting cases were binding precedent. Further, nowhere does Respondent disagree that the requirement that an attorney achieve more than was owed in order to qualify for fee enhancement is both impossible and legally erroneous. Instead, the Respondent relies upon mischaracterizations of the CFC's opinion and the facts in an attempt to gloss over these legal errors. If allowed to stand, this decision—rendered by a court with national jurisdiction—will (1) confuse the currently clear standard for interpretation of

* Petitioners' Rule 29.6 Statement appears at Pet. ii.

settlement agreements, and (2) effectively nullify this Court's express authorization of enhancement in exceptional cases.

1. Respondent goes to tortuous lengths to avoid the CFC's holding "that this Court's fee shifting cases are binding upon parties to a settlement agreement that incorporates no fee shifting statute." *See* Brief in Opposition ("Opp.") 4-5. But the CFC's opinion could not be clearer on this point. The CFC viewed the situation in black and white terms: either common fund or fee-shifting cases would bind its decision. Pet. App. 18a-23a. The court found the fee-shifting cases more analogous, and unequivocally concluded that "the principles applicable in fee shifting cases * * * *shall be applied* by this court." *Id.* 22a-23a (emphasis added). The court thereafter treated fee-shifting cases as if they were binding precedent rather than guidelines outlining the relevant policy considerations. This squarely conflicts with the analyses of the *Wing* and *Dutchak* courts, which concluded that in the context of a settlement agreement contract principles alone apply. *See Wing* v. *Asarco*, 114 F.3d 986, 989 (9th Cir. 1997); *Dutchak* v. *Central States, Southeast & Southwest Areas Pension Fund*, 932 F.2d 591, 594 (7th Cir. 1991).

Because the court explicitly found that the parties did not incorporate the URA into their settlement agreement, it was error to interpret the contract as if fee-shifting principles were binding. In doing so, the CFC engrafted Congressional intent and the severe limitations of fee-shifting statutes upon the settlement agreement, despite separately concluding that the parties had unquestionably not intended those restrictions to apply.[1]

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[1] Remarkably, Respondent asserts without citation that the URA "formed the backdrop for the negotiation of the settlement agreement." Opp. 5. In fact, the CFC found that "there is not a shred of evidence either that the parties intended that the determination of a 'reasonable' attorneys fee would be controlled by the

2. Respondent includes an entire footnote justifying the CFC's use of the lodestar approach—despite the fact that the initial petition for certiorari did not contest the propriety of such an approach. Opp. 5 n.3; Pet. 13-16. Respondent has missed the point entirely. The error of the CFC was not in engaging in a lodestar calculation, but in believing itself foreclosed from all further inquiry (save exceptionality) by "severely restricting" fee-shifting principles. Pet. App. 19a.[2]

Rather than utilizing principles of contract interpretation to review factors traditionally bearing upon a reasonable fee, such as risk, delay, counsel's continuing obligations, and the fees incurred under Petitioners' admittedly reasonable contingent fee agreements,[3] the CFC applied the restrictions

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URA or even that defendant somehow unilaterally expressed or reserved the point." Pet. App. 11a.

[2] *Gisbrecht* v. *Commissioner of Social Security*, 535 U.S. 789, 807-809 (2002), illustrates two relevant points: (1) that fee-shifting case law is binding only when the court is awarding fees under a fee-shifting statute, and (2) the existence of a reasonable contingent fee agreement is a relevant factor when no fee-shifting statute applies. This Court and others have readily recognized that, *absent statutory restrictions*, a reasonable fee for a lawyer who is paid promptly as litigation progresses is not a reasonable fee for a lawyer who bears the risk of non-payment if unsuccessful, as well as the delays and costs attendant thereto. Pet. 14 n.12.

[3] Undisputed testimony and Respondent's admissions established that Petitioners' contingent fee agreements were reasonable and that the fees thereunder were actually incurred. Appellants' Fed. Cir. Br. 61 (citing Respondent's admissions during argument at A1911, A1913); Fed. Cir. Reply Br. 28 (citing testimony of Respondent's and Petitioners' expert witnesses and Respondent's admissions during argument at A1474, A1790, A1913, and A1954). The CFC clearly thought itself bound to ignore this uncontested evidence—highly relevant in determining a reasonable fee—because it had unilaterally declared itself to be constrained by severely restrictive fee shifting principles.

of fee-shifting jurisprudence to Petitioners' claim although acknowledging no fee-shifting statute was applicable. This error directly conflicts with this Court's jurisprudence and the Seventh and Ninth Circuits' decisions in *Wing* and *Dutchak.*

3. Respondent next attempts to salvage the CFC's decision by asserting that there is no conflict with *Wing* and *Dutchak* because those courts also "looked to fee-shifting cases for guidance," Opp. 8, and that the awards of enhancements in those cases were "based on provisions of the particular settlement agreements * * * not present here." *Id.* n.5. Upon examination, neither statement supports Respondent's position.

a. It is true that the *Wing* and *Dutchak* courts "looked to fee-shifting cases for guidance," in that they cited to some fee-shifting decisions and utilized the principles of fee-shifting cases *where appropriate.* The Seventh and Ninth Circuits properly maintained the primacy of contract, however, and did not foreclose entire avenues of inquiry by forcing the settlement agreements to masquerade as either "fish" or "fowl." *See Wing*, 114 F.3d at 989 (recognizing similar circumstance as "neither fish nor fowl nor fair weather game; i.e., neither *Dague*[4] (in that the fee-shifting is voluntary and contractual rather than statutorily-mandated)

Respondent is wrong to suggest that the above statement and other assertions in the Petition are unsupported because the Petition cites to the appellate briefs. Opp. 4 n.2. The pages referenced in the briefs refer in turn to the record, and thus the statements are clearly not "unsupported." In analyzing whether a statement is substantiated, the Court looks to the citations within the cited source. *See Konigsberg* v. *State Bar of Cal.*, 353 U.S. 252, 256 n.7 (1957) ("The brief did refer to pages of the record where constitutional arguments were made and cases cited to support them.").

[4] *City of Burlington* v. *Dague*, 505 U.S. 557 (1992).

nor *WPPSS*[5] (in that class counsel's fee would come from the defendant directly and not out of the class recovery)"); *Dutchak*, 932 F.2d at 594-595 ("Instead of classifying the case as 'common fund' or 'fee shifting,' [the court] must plumb the language of the settlement to determine its meaning and, if ambiguous, to determine the parties' intent."). Unlike the CFC, the Seventh and Ninth Circuits examined all the relevant information in determining the proper fee.

b. Respondent suggests that the *Wing* agreement "expressly contemplated a fee award of more than twice the amount of the agreed-upon lodestar figure," Opp. 8 n.5, seeming to imply that the agreement provided for fees consisting of a multiple of the lodestar. This is simply untrue. In fact, the parties agreed on the lodestar, but disagreed as to whether a multiplier was appropriate. The sole reference to a large fee award was a contingency plan for installment payments.[6]

As Respondent notes, the settlement agreement in *Dutchak* did specifically refer to four decisions that approved contingency multipliers, but also "other relevant federal court decisions based thereon." 932 F.2d at 593. Rather than classifying itself as bound by fee-shifting principles, the court examined the parties' intent behind the choice of law provi-

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[5] *In re Washington Public Power Supply Sys. Sec. Litig.*, 19 F.3d 1291 (9th Cir. 1994).

[6] The Settlement Agreement permitted Asarco to take up to two years to pay the attorneys' fee award if it exceeded $10 million. A few days later, the parties reached a supplemental agreement regarding attorneys' fees. The parties agreed that class counsel's lodestar was equal to or less than $4 million, with expenses in excess of $1.5 million, and that Asarco would not litigate this amount. The parties further stipulated that "[w]ith regard to any multiplier on the lodestar, either side may argue its position to Judge Dwyer" and either party could appeal the amount of any multiplier awarded. *Wing*, 114 F.3d at 988.

sion and determined that later, more restrictive fee-shifting jurisprudence did not apply. Thus, the Seventh Circuit also properly treated settlement agreements and fee-shifting statutes as two different animals and, accordingly, found the parties' intent dispositive. The CFC did not maintain this distinction, and that was its error.

4. Respondent does not dispute that requiring an attorney to recover more than what was owed in order to qualify for an "extraordinary results" fee enhancement is impossible and would require violation of the Federal Rules of Civil Procedure. *See* Pet. 23-24. Instead, Respondent attempts both to minimize Petitioners' achievement and to incorrectly assert that the court did not treat this erroneous standard as dispositive.[7]

a. The CFC unquestionably treated the failure to achieve more than was owed as dispositive on the issue of extraordinary results:

> The results so depicted, while remarkable, are, nonetheless, precisely what plaintiffs set out to accomplish in filing this suit. *Accordingly, measured by plaintiffs' own expectations at the outset of the case, the results obtained were not exceptional, but rather reflect what was owed.* Pet. App. 46a (emphasis added).

The CFC clearly applied this exceptional results standard as a conclusive *threshold* determination. Only results in excess of what was owed could be deemed exceptional, rendering an afterthought any further considerations of

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[7] Respondent is wrong to suggest that the CFC's adoption of an impossible standard for exceptionality is in accordance with *Blum* v. *Stenson*, 465 U.S. 886 (1984). Opp. 9. Nowhere in *Blum* did this Court require litigants to recover more than they were owed in order to prove an exceptional result.

exceptionality.[8] Pet. App. 44a–49a. Nothing in this Court's jurisprudence has suggested that a determination of exceptionality should be based upon such a threshold factor, especially one that is impossible and requires a procedural rules violation.

b. Furthermore, Respondent's attempt to downplay the results achieved in this case[9] is disingenuous, given Respondent's inside knowledge of the exceptional nature of the relief achieved by Petitioners. In its petition for certiorari in *Banks* v. *United States*, the Department of Justice admitted

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[8] As to the other factors the Respondent maintains were a sufficient basis for the refusal of the multiplier, undisputed record evidence established that: (1) the relief obtained did indeed change longstanding Corps policy against the Brevard County Shore Protection Project; (2) the appropriation that resulted from Petitioners' significant efforts in Congress was itself a highly risky and exceptional settlement condition; (3) Petitioners' contingent fee agreements undisputedly entitled Petitioners to a fee in excess of hourly rates; and (4) the CFC's speculation as to the attractiveness of the case was not only unsupported by any evidence, it was in error. Appellants' Fed. Cir. Br. 30-40, Fed. Cir. Reply Br. 11-12. Moreover, the fourth factor above was not set forth by Petitioners to show the result to be exceptional, but was argued to be an independent basis for enhancing the lodestar. Thus, unattractiveness was not at issue on appeal. Likewise, the third factor above was simply a consideration the CFC noted that "several courts" had considered. Pet. App. 45a.

[9] Respondent's suggestion that this case provided limited relief is simply wrong. After seven years of litigation and three years to obtain Congressional appropriations, Petitioners achieved a result that paid $5 million in damages plus interest to over 300 beachfront property owners and cities, plus a massive $42 million beach re-nourishment project that even the CFC recognized benefited "not only [Petitioners] and adjoining landowners, but the general public, as well." Pet. 8 n.3; Pet. App. 21a. The benefit to beachfront property values as a direct result of the project totaled $220 million. Pet. 8 n.3.

that it has defended "more than 100 cases involving an alleged taking by erosion (or, in a few instances, accretion). As in this case, such suits commonly are multi-party actions with tens or hundreds of plaintiffs whose ownership interests collectively span miles of ground." Petition for a Writ of Certiorari at 18, *Banks* v. *United States* (No. 03-402), *cert. denied*, 124 S. Ct. 486 (2003). Of these over one hundred erosion-based takings cases filed against the United States, it is only Petitioners who achieved both the payment of millions of dollars in damages and construction of a massive beach re-nourishment project. Pet. 8. Thus, the outcome of this litigation is truly extraordinary.

c. Respondent's focus upon the nature of relief granted in *Hyatt* v. *Apfel,* 195 F.3d 188 (4th Cir. 1999), is misplaced. Respondent suggests that *Hyatt* requires attorneys to change policy nationwide and impact beyond the confines of the litigation before the result can be considered exceptional. Opp. 10. Yet nothing in either this Court's jurisprudence or the *Hyatt* opinion suggests such an arbitrary standard.[10] Indeed, one can easily imagine an exceptional case that does not have such a component. *See, e.g.*, *Wing*, 114 F.3d at 988-989 (awarding exceptional results enhancement for monetary result achieved in localized case not involving policy change or impact beyond the confines of the litigation).

Furthermore, even if such a standard did exist, the result in this case actually satisfies it. Petitioners not only achieved appropriation and funding of the Brevard County Shore Protection Project despite national policy against such projects, Pet. 8 n.5; Appellants' Fed. Cir. Br. 8-9, but, as the CFC found, the project benefited "not only [Petitioners] and

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[10] *Hyatt* approved a "results enhancement" although the relief ordered was no more than that sought by plaintiffs in their complaint. Pet. 6-7. By contrast, the CFC here concluded that a failure to achieve more than what was owed was fatal to a claim for exceptional results.

adjoining landowners, but the general public, as well." Pet. App. 21a.

5. Finally, Respondent presents no evidence or citation to deny that this case is one of recurring national importance. Given the national jurisdiction of the CFC and Federal Circuit, their decisions have far-reaching impact upon federal contract law.

Three circuits have already addressed the interpretation of settlement agreements in this exact context, and the question will undoubtedly recur. The issue of exceptionality, of course, can arise every time a case is decided under any of the more than 100 federal fee-shifting statutes.

* * * *

For the foregoing reasons, and those stated in the petition, the petition for a writ of certiorari should be granted.

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